

20, 1989 at 2:00 p.m. at MITRE Corp., Wilson Building—7600 Old Springhouse Road, McLean, Va.

The purpose of the meeting is to review contributions for the July 3-13 meeting of Study Group VII, Geneva, Switzerland, and consider any other business relevant to Study Group D terms of reference.

Members of the general public may attend the meeting and join in the discussion, subject to the instructions of the Chairman. Admittance of public members will be limited to the seating available. In that regard, entrance to the building is controlled and entry will be facilitated if arrangements are made in advance of the meeting. Prior to the meeting, persons who plan to attend should so advise the office of Mr. Paul Tsuchiya, at Mitre Corporation, telephone (703) 883-7532. A guard will escort attendees to the proper meeting room.

Date: May 2, 1989.

Earl S. Barbely,

Director, Office of Telecommunications and Information Standards; Chairman U.S. CCITT National Committee.

[FR Doc. 89-11795 Filed 5-16-89; 8:45 am]

BILLING CODE 4710-07-M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

Date: May 11, 1989.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2224, 15th and Pennsylvania Avenue NW., Washington, DC 20220.

Internal Revenue Service

OMB Number: 1545-0609.

Form Number: 1285C, 1285(DO/SC) (C).

Type of Review: Extension.

Title: Problem Resolution Program; Follow-up Letter

Description: After a taxpayer problem is resolved, follow-up comments are needed to evaluate individual case processing, monitor taxpayer satisfaction, and to provide a form for

the taxpayer to comment or suggest improvements on the program. Letters 1285C and 1285(DO/SC) (C) are used for these purposes.

Respondents: Individuals or households, Farms, Businesses or other for-profit.

Estimated Number of Respondents: 15,000.

Estimated Burden Hours Per Response: 20 minutes.

Frequency of Response: On occasion.

Estimated Total Reporting Burden: 3,000 hours.

Clearance Officer: Garrick Shear (202) 535-4297, Internal Revenue Service, Room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.

OMB Reviewer: Milo Sunderhauf (202) 395-6880, Office of Management and Budget, Room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports, Management Officer. [FR Doc. 89-11796 Filed 5-16-89; 8:45 am]

BILLING CODE 4810-25-M

Public Information Collection Requirements Submitted to OMB for Review.

Date: May 11, 1989.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2224, 15th and Pennsylvania Avenue NW., Washington, DC 20220.

Alcohol, Tobacco and Firearms

OMB Number: 1512-0485.

Form Number: ATF REC 5120/2 and ATF F 5125.25 (698).

Type of Review: Extension.

Title: Application to Establish and Operate Wine Premises (ATF REC 5120/2).

Letterhead Applications, and Notices Related to Wine (ATF F 5125.25 (698)).

Description: Applications, letterhead applications and notices relating to wine are required to ensure that the intended activity will not jeopardize the revenue, due the Federal Government.

Respondents: Farms, Businesses or other for-profit, Small businesses or organizations.

Estimated Number of Respondents: 1
Estimated Burden Hours Per Response: 1 hour

Frequency of Response: On occasion.
Estimated Total Reporting Burden: 1 hour.

Clearance Officer: Robert Masarsky (202) 566-7077, Bureau of Alcohol, Tobacco and Firearms, Room 7011, 1200 Pennsylvania Avenue NW., Washington, DC 20226.

OMB Reviewer: Milo Sunderhauf (202) 395-6880, Office of Management and Budget, Room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports, Management Officer. [FR Doc. 89-11797 Filed 5-16-89; 8:45 am]

BILLING CODE 4810-25-M

UNITED STATES INFORMATION AGENCY

A Grants Program for Private Not-for-Profit Organizations; in Support of International Educational and Cultural Activities

The United States Information Agency (USIA) announces a program of selective assistance and limited grant support to non-profit activities of United States institutions and organizations in the Private Sector. The program is designed to increase mutual understanding between the peoples of the United States and Taiwan and to strengthen the ties which unite our societies. The information collection involved in this solicitation is covered by OMB Clearance Number 3116-0175, entitled "Grants Programs for Private, Non-Profit Organizations in Support of International Educational and Cultural Activities," announced in the Federal Register February 9, 1989.

Private Sector Organizations interested in working cooperatively with USIA on the following concept are encouraged to so indicate.

Taiwan Agricultural Trade Journalists

The Office of Private Sector Programs proposes a 21-day program for ten agricultural trade journalists from Taiwan designed to give them a greater understanding of the American perspective on issues of international agricultural trade. The program should begin in September 1989. A U.S. not-for-profit institution will design the program and select the American participants. The American Institute in Taiwan will choose the journalists from Taiwan. A U.S. not-for-profit institution with expertise in the fields of journalism and

American agricultural policies will conceive and execute the program. American participants should include journalists and government and private sector officials in agriculture. The program design should include a session in Washington, DC, as well as visits to one or two important agricultural centers of the country.

USIA is most interested in working with organizations that show promise for innovative and cost-effective programming, and with organizations that have potential for obtaining private-sector funding in addition to USIA

support. Organizations must have the substantive expertise and logistical capability needed to develop and conduct the above project successfully and should also demonstrate a potential for designing programs which will have lasting impact on their participants.

Interested organizations should submit a request for complete application materials—postmarked no later than twenty-one days from the date of this notice—to the address listed below. The Office of Private Sector Programs will then forward a set of materials, including proposal guidelines.

Please refer to these specific programs by name in your letter of interest: Office of Private Sector Programs, Bureau of Educational and Cultural Affairs (ATTN: Initiative Grants, Taiwan Agricultural Journalists), United States Information Agency, 301 4th Street SW., Washington, DC 20547.

Dated: April 21, 1989.

Robert Francis Smith,
Director, Office of Private Sector Program.
[FR Doc. 89-11742 Filed 5-16-89; 8:45 am]

BILLING CODE 8230-01-M

Corrections

Federal Register

Vol. 54, No. 94

Wednesday, May 17, 1989

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 611 and 675

[Docket No. 90407-9107]

Foreign Fishing; Groundfish of the Bering Sea and Aleutian Islands

Correction

In proposed rule document 89-10535 beginning on page 19199 in the issue of Thursday, May 4, 1989, make the following correction:

On page 19199, in the second column, under **DATE**, in the second line, "June 19, 1989" should read "June 12, 1989".

BILLING CODE 1505-01-D

DEPARTMENT OF DEFENSE

Department of the Army

32 CFR Part 536

Claims Against the United States

Correction

In rule document 88-27867 beginning on page 49298 in the issue of Wednesday, December 7, 1988, make the following correction:

On page 49302, in § 536.5, beginning with paragraph (d) in the first column and up to paragraph (g) in the third column, text was printed out of order. The text is correctly published below.

§ 536.5 [Corrected]

* * * * *

(d) *Action by claimant*—(1) *Form of claim*. The claimant will submit his claim using authorized official forms whenever practicable. A claim is filed only when the elements indicated in § 536.3(c) have been supplied in writing by a person authorized to present a claim, unless the claim is cognizable under a regulation that specifies

otherwise. A claim may be amended by the claimant at any time prior to final agency action or prior to the exercise of the claimant's option under 28 U.S.C. 2675(a).

(2) *Signatures*. (i) The claim and all other papers will be signed in ink by the claimant or by his duly authorized agent. Such signature will include the first name, middle initial, and surname. A married woman must sign her claim in her given name, for example, "Mary A. Doe," rather than "Mrs. John Doe."

(ii) Where the claimant is represented, the supporting evidence required by subparagraph (a)(5) of this section will be required only if the claim is signed by the agent or legal representative. However, in all cases in which a claimant is represented, the name and address of the representative will be included in the file together with copies of all correspondence and records of conversations and other contacts maintained and included in the file. Frequently, these records are determinative as to whether the statute of limitations has been tolled.

(3) *Presentation*. The claim should be presented to the commanding officer of the unit involved, or to the legal office of the nearest Army post, camp, or station, or other military establishment convenient to the claimant. In a foreign country where no appropriate commander is stationed, the claim should be submitted to any attaché of the U.S. Armed Forces. Claims cognizable under Article VIII of the Agreement Regarding the Status of Forces of Parties to the North Atlantic Treaty, Article XVIII of the Treaty of Mutual Cooperation and Security between the United States and Japan regarding facilities and areas and the Status of United States Armed Forces in Japan (Japan SOFA) or other similar treaty or agreement are filed with designated claims officials of the receiving State.

(e) *Evidence to be submitted by claimant*. The claimant should submit the evidence necessary to substantiate his claim. It is essential that independent evidence be submitted which will substantiate the correctness of the amount claimed.

(f) *Statute of limitations*—(1) *General*. Each statute available to the Department of the Army for the administrative settlement of claims, except the Maritime Claims Settlement

Act (10 U.S.C. 4802), specifies the time during which the right to file a claim must be exercised. These statutes of limitations, which are jurisdictional in nature, are not subject to waiver unless the statute expressly provides for waiver. Specific information concerning the period for filing under each statute is contained in the appropriate implementing sections of this regulation.

(2) *When a claim accrues*. A claim accrues on the date on which the alleged wrongful act or omission results in an actionable injury or damage to the claimant or his decedent. Exceptions to this general rule may exist where the claimant does not know the cause of injury or death; that is, the claim accrues when the injured party, or someone acting on his or her behalf, knows both the existence and the cause of his or her injury. However, this exception does not apply when, at a later time, he or she discovers that the acts inflicting the injury may constitute medical malpractice. (See *United States v. Kubrick*, 444 U.S. 111, 100 S. Ct. 352 (1979).) The discovery rule is not limited to medical malpractice claims; it has been applied to diverse situations involving violent death, chemical and atomic testing, and erosion and hazardous work environment. In claims for indemnity or contribution against the United States, the accrual date is the time of the payment for which indemnity is sought or on which contribution is based.

(3) *Effect of infancy, incompetency or the filing of suit*. The statute of limitations for administrative claims is not tolled by infancy or incompetency. Likewise, the statute of limitations is not tolled for purposes of filing an administrative claim by the filing of a suit based upon the same incident in a Federal, State, or local court against the United States or other parties.

(4) *Amendment of claims*. A claim may be amended by the claimant at any time prior to final agency action or prior to the exercise of the claimant's option under 28 U.S.C. 2675(a). A claim may be amended by changing the amount, the bases of liability, or elements of damages concerning the same incident. Parties may be added only if the additional party could have filed a joint claim initially. If the additional party had a separate cause of action, his claim may not be treated as an amendment but only as a separate claim and is thus

barred if the statute of limitations has run. For example, if a claim is timely filed on behalf of a minor for personal injuries, a subsequent claim by a parent for loss of services is considered a separate claim and is barred if it is not filed prior to the running of the statute of limitations. Another example is where a separate claim is filed for loss of services or consortium by a spouse arising out of injuries to the husband or wife of the claimant. On the other hand, if a claim is timely filed by an insured for the deductible portion of the property damage, a subsequent claim by the insurer based on payment of property damage to its insured may be filed as an amendment even though the statute of limitations has run, unless final action has been taken on the insured's claim.

(5) *Date of receipt stops the running of the statute.* In computing this time to determine whether the period of limitations has expired, exclude the first day and include the last day, except when it falls on a nonworkday such as Saturday, Sunday, or a legal holiday, in which case it is to be extended to the next workday.

* * * * *

BILLING CODE 1505-01-D

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP89-95-001]

Texas Eastern Transmission Corp.; Proposed Changes in FERC Gas Tariff

Correction

In notice document 89-11012 appearing on page 19948 in the issue of Tuesday, May 9, 1989, in the second column, in the heading, the "Docket No." was inaccurate and should read as set forth above.

BILLING CODE 1505-01-D

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TM89-3-29-000]

Transcontinental Gas Pipe Line Corp.; Proposed Changes in FERC Gas Tariff

Correction

In notice document 89-11062 appearing on page 19949 in the issue of Tuesday, May 9, 1989, in the first column, in the heading, the "Docket No."

was inaccurate and should read as set forth above.

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[AD-FRL-3468-4]

Standards of Performance for New Stationary Sources; Amendments to Test Methods and Procedures

Correction

In rule document 89-3064 beginning on page 6660 in the issue of Tuesday, February 14, 1989, make the following corrections:

§ 60.8 [Corrected]

1. On page 6662, in the second column, in amendatory instruction 3, in the second line, "on" should read "or".

§ 60.46 [Corrected]

2. On the same page, in the 3rd column, in § 60.46(b)(1), in the 10th line, "%O₂" should read "%O₂".

§ 60.43a [Corrected]

3. On page 6663, in the third column, in amendatory instruction 8, the equation should read as follows:
 $E_s = (340x + 520 y)/100$ and
 $\%P_s = 10$

4. On the same page, in the same column, in amendatory instruction 9, the equations should read as follows:
 $E_s = (340x + 520 y)/100$ and
 $\%P_s = (10x + 30 y)/100$

§ 60.234 [Corrected]

5. On page 6671, in the first column, in § 60.234(b)(3)(ii), in the fifth line, "(R_{p2})" should read "(R_p)".

§ 60.266 [Corrected]

6. On the same page, in the third column, in § 60.266(c)(1), the equation should read as follows:

$$E = \left[\sum_{i=1}^N (C_{si} Q_{sdi}) \right] / (P K)$$

§ 60.275 [Corrected]

17. On page 6672, in the second column, in § 60.275, at the beginning of the second paragraph, the paragraph designation "(d)" should read "(b)".

8. On the same page, in the third column, in § 60.275(e)(2), the equation should read as follows:

$$C_{st} = \left[\sum_{i=1}^n (C_{si} Q_{sdi}) \right] / \sum_{i=1}^n Q_{sdi}$$

§ 60.275a [Corrected]

9. On page 6673, in the second column, in § 60.275a(e)(2), the equation should read as follows:

$$C_{st} = \left[\sum_{i=1}^n (C_{si} Q_{sdi}) \right] / \sum_{i=1}^n Q_{sdi}$$

§ 60.285 [Corrected]

10. On the same page, in the third column, in § 60.285(c)(1), in the eighth line, "C_s" should read "C_s".

11. On the same page, in the same column, in § 60.285(c)(2), in the third line, "(C_s)" should read "(C_s)".

12. On page 6674, in the 1st column, in § 60.285(d)(3), in the 11th line, "(NaC₂O)" should read "(Na₂O)"; and after the 13th line, the equation and its conditions should read as follows:

$$GLS = 100 C_{Na_2S} / (C_{Na_2S} + C_{NaOH} + C_{Na_2CO_3})$$

Where:

GLS = green liquor sulfidity, percent.

C_{Na₂S} = concentration of Na₂S, as Na₂O, mg/liter (gr/gal).

C_{NaOH} = concentration of NaOH as Na₂O, mg/liter (gr/gal).

C_{Na₂CO₃} = concentration of Na₂CO₃ as Na₂O, mg/liter (gr/gal).

§ 60.296 [Corrected]

13. On the same page, in the second column, in § 60.296(b)(1), the equation should read as follows:

$$Y = (H_1 L) / (H_1 L + H_2 G)$$

14. On the same page, in the same column, in § 60.296(d)(1), the equation should read as follows:

$$E = (C_s Q_{sd} - A) / P$$

§ 60.404 [Corrected]

15. On page 6676, in the third column, in § 60.404(b)(1), in the sixth and seventh lines "kb/Mg" should read "kg/Mg".

§ 60.503 [Corrected]

16. On page 6679, in the first column, in § 60.503(c)(3), the equation should read as follows:

$$E = K \sum_{i=1}^n (V_{est} C_{ei}) / (L 10^9)$$

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Food and Drug Administration**

[Docket No. 89M-0112]

Unilens Corp. Premarket Approval of Unilens™ 53 (Ocufilecon B) Soft (Hydrophilic) Aspheric Contact Lens*Correction*

In notice document 89-10762 beginning on page 19440 in the issue of Friday, May 5, 1989, make the following correction:

On page 19440, in the 3rd column, under **Opportunity for Administrative Review**, in the 22nd through the 24th lines, remove "data and information showing that there is a genuine and substantial".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR**Bureau of Land Management**

[CA-940-09-4212-13; CACA 22587]

California Realty Action; Exchange of Public and Private Lands in Riverside County and Order Providing for Opening of Public Land*Correction*

In notice document 89-10117 beginning on page 18162 in the issue of Thursday,

April 27, 1989, make the following corrections:

1. On page 18162, in the third column, the second line should read "Sec. 30, lot 11, S½NE¼NE¼SW¼,".

2. On the same page, in the same column, the 10th line should read "Sec. 21, S½NE¼, SW¼NW¼,".

3. On the same page, in the same column, under **San Bernadino Meridian, California**, the first line should read "T.4 S., R. 6 E.,".

4. On the same page, in the same column, under **San Bernadino Meridian, California**, the 16th line should read "Sec. 9, SE¼, W½NW¼NW¼, SE¼,".

5. On the same page, in the same column, under **San Bernadino Meridian, California**, the 22nd line should read "NW¼NE¼, SE¼NW¼NE¼,".

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 71**

[Airspace Docket No. 89-AWP-3]

Proposed Establishment of Transition Area, Lovelock, NV*Correction*

In proposed rule document 89-6280 appearing on page 11232 in the issue of Friday, March 17, 1989, make the following correction:

§ 71.181 [Corrected]

On page 11232, in the third column, in § 71.181, under **Lovelock, NV [New]**, in the third line, "40°40'05"N." should read "40°04'05"N.".

BILLING CODE 1505-01-D

DEPARTMENT OF THE TREASURY**Customs Service****19 CFR Part 192**

[T.D. 89-46]

RIN 1515-AA65

Customs Regulations Amendments Relating to Exportation of Used Self-Propelled Vehicles*Correction*

In rule document 89-9217 beginning on page 15402 in the issue of Tuesday, April 18, 1989, make the following correction:

PART 192-[CORRECTED]

1. On page 15403, in the third column, in the table of sections for Part 192, in the entry for § 192.2, "exportations" should read "exportation".

§ 192.2 [Corrected]

2. On page 15404, in the second column, in § 192.2(b), in the sixth line, remove the comma after "presented" and insert a period.

BILLING CODE 1505-01-D

Federal Register

Wednesday
May 17, 1989

Part II

United States Sentencing Commission

Sentencing Guidelines for United States
Courts; Notice of Submission of
Amendments to Congress

UNITED STATES SENTENCING COMMISSION

Amendments to the Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of submission of amendments to the sentencing guidelines to the Congress.

SUMMARY: Pursuant to its authority under section 994(p) of Title 28, United States Code, the Commission on May 1, 1989, submitted to the Congress for review a report containing a number of amendments to the sentencing guidelines, policy statements, and official commentary, together with the reasons for the amendments. The Commission's report also incorporated by reference certain temporary amendments previously adopted by the Commission pursuant to Section 21 of the Sentencing Act of 1987. These temporary amendments, which took effect June 15, 1988, are set out in the *Federal Register* of April 29, 1988 [53 FR 15532]. Notice of the amendments submitted to the Congress on May 1, 1989, was published in the *Federal Register* of March 3, 1989 [54 FR 9121], and a public hearing on the proposed amendments was held in Washington, D.C. on April 7, 1989. After review of the hearing testimony and additional public comment, the Commission promulgated the following amendments at meetings on April 18, 19, 25, and 28, 1989, each amendment having been approved by at least four voting Commissioners. During the requisite 180-day period of Congressional review, or at any time, the Commission welcomes comment on the amendments or any other aspect of the sentencing guidelines, policy statements, and official commentary.

DATES: Pursuant to 28 U.S.C. 994(p), as amended by section 7109 of the Anti-Drug Abuse Act of 1988 [Pub. L. 100-690, Nov. 18, 1988], the Commission has specified an effective date of November 1, 1989, for these amendments.

ADDRESS: Comments should be sent to: United States Sentencing Commission, 1331 Pennsylvania Avenue, NW., Suite 1400, Washington, DC 20004, Attention: Guidelines Comment.

FOR FURTHER INFORMATION CONTACT: Paul K. Martin, Communications Director for the Commission, telephone (202) 662-8800.

Authority: 28 U.S.C. 994(a), (p); Section 7109 of the Anti-Drug Abuse Act of 1988. William W. Wilkins, Jr., Chairman.

Chapter One, Part A, Section 4(b) Departures

1. *Amendment:* Chapter One, Part A (4)(b) is amended in the first sentence by deleting " * * * that was" and inserting in lieu thereof "of a kind, or to a degree,".

Chapter One, Part A, section 4(b) is amended in the second sentence of the last paragraph by deleting "Part H" and inserting in lieu thereof "Part K (Departures)", and in the third sentence of the last paragraph by deleting "Part H" and inserting in lieu thereof "Part K".

Reason for Amendment: The purposes of this amendment are to conform the quotation to the statute, as amended by Section 3 of the Sentencing Act of 1987, and to correct a clerical error.

2. *Amendment:* Chapter One, Part A, section 4(b) is amended in the first sentence of the fourth paragraph by deleting "three" and inserting in lieu thereof "two"; in the fourth paragraph by deleting: "The first kind, which will most frequently be used, is in effect an interpolation between two adjacent, numerically oriented guideline rules. A specific offense characteristic, for example, might require an increase of four levels for serious bodily injury but two levels for bodily injury. Rather than requiring a court to force middle instances into either the 'serious' or the 'simple' category, the guideline commentary suggests that the court may interpolate and select a midpoint increase of three levels. The Commission has decided to call such an interpolation a 'departure' in light of the legal views that a guideline providing for a range of increases in offense levels may violate the statute's 25 percent rule (though other have presented contrary legal arguments). Since interpolations are technically departures, the courts will have to provide reasons for their selection, and it will be subject to review for 'reasonableness' on appeal. The Commission believes, however, that a simple reference by the court to the 'mid-category' nature of the facts will typically provide sufficient reason. It does not foresee serious practical problems arising out of the application of the appeal provisions to this form of departure."; in the first sentence of the fifth paragraph by deleting "second" and inserting in lieu thereof "first"; and, in the first sentence of the sixth paragraph by deleting "third" and inserting in lieu thereof "second".

Reason for Amendment: This amendment eliminates references to

interpolation as a special type of departure. The Commission has reviewed the discussion of interpolation in Chapter One, which has been read as describing "interpolation" as a departure from an offense level rather than from the guideline range established after the determination of an offense level. The Commission concluded that it is simpler to add intermediate offense level adjustments to the guidelines in the cases where interpolation is most likely to be considered (i.e., degree of bodily injury). This amendment is not intended to preclude interpolation in other cases; where appropriate, the court will be able to achieve the same result by use of the regular departure provisions.

§ 1B1.1 (Application Instructions)

3. *Amendment:* Section 1B1.1(a) is amended by deleting "guideline section in Chapter Two most applicable to the statute of conviction" and inserting in lieu thereof "applicable offense guideline section from Chapter Two", and by deleting: "If more than one guideline is referenced for the particular statute, select the guideline most appropriate for the conduct of which the defendant was convicted."

Reason for Amendment: The purposes of this amendment are to clarify the guideline and conform the language to § 1B1.2.

4. *Amendment:* Section 1B1.1(e) is amended by deleting "The resulting offense level is the total offense level."

Section 1B1.1(g) is amended by deleting "total", and by inserting "determined above" immediately following "category".

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

5. *Amendment:* The Commentary to § 1B1.1 captioned "Application Notes" is amended in Note 1(c) by deleting "firearm or other dangerous weapon" and inserting in lieu thereof "dangerous weapon (including a firearm)".

The Commentary to § 1B1.1 captioned "Application Notes" is amended in Note 1(d) by inserting the following additional sentence:

"Where an object that appeared to be a dangerous weapon was brandished, displayed, or possessed, treat the object as a dangerous weapon."

The Commentary to § 1B1.1 captioned "Application Notes" is amended in Note 1(g) by deleting "firearm or other dangerous weapon" the first time it appears and inserting in lieu thereof "dangerous weapon (including a firearm)".

The Commentary to § 1B1.1 captioned "Application Notes" is amended by inserting the following additional Note:

"5. Where two or more guideline provisions appear equally applicable, but the guidelines authorize the application of only one such provision, use the provision that results in the greater offense level. E.g., in § 2A2.2(b)(2), if a firearm is both discharged and brandished, the provision applicable to the discharge of the firearm would be used."

Reason for Amendment: The purposes of this amendment are to clarify the definition of a dangerous weapon; and to clarify that when two or more guideline provisions appear equally applicable, but the guidelines authorize the application of only one such provision, the provision that results in the greater offense level is to be used.

6. Amendment: The Commentary to § 1B1.1 captioned "Application Notes" is amended by inserting as an additional Note:

"5. In the case of a defendant subject to a sentence enhancement under 18 U.S.C. § 3147 (Penalty for an Offense Committed While on Release), see § 2J1.7 (Commission of Offense While on Release)."

Reason for Amendment: The purpose of this amendment is to clarify the treatment of a specific enhancement provision.

§ 1B1.2 (Applicable Guidelines)

7. Amendment: Section 1B1.2(a) is amended in the first sentence by deleting "The court shall apply" and inserting in lieu thereof "Determine"; and in the second sentence by deleting "the court shall apply" and inserting in lieu thereof "determine", and by deleting "guideline in such chapter" and inserting in lieu thereof "offense guideline section in Chapter Two".

Reason for Amendment: The purposes of this amendment are to clarify the guideline and to make the phraseology of this subsection more consistent with that of §§ 1B1.1 and 1B1.2(b).

8. Amendment: Section 1B1.2(a) is amended in the first sentence by inserting immediately before the period "(i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted)".

The Commentary to § 1B1.2 captioned "Application Notes" is amended in Note 1 by deleting:

"As a general rule, the court is to apply the guideline covering the offense conduct most applicable to the offense of conviction. Where a particular statute proscribes a variety of conduct which might constitute the subject of different guidelines, the court will decide which guideline applies based upon the nature of the offense conduct charged."

and inserting in lieu thereof:

"As a general rule, the court is to use the guideline section from Chapter Two most applicable to the offense of conviction. The Statutory Index (Appendix A) provides a listing to assist in this determination. When a particular statute proscribes only a single type of criminal conduct, the offense of conviction and the conduct proscribed by the statute will coincide, and there will be only one offense guideline referenced. When a particular statute proscribes a variety of conduct that might constitute the subject of different offense guidelines, the court will determine which guideline section applies based upon the nature of the offense conduct charged in the count of which the defendant was convicted."

Reason for Amendment: The purpose of this amendment is to clarify the guideline and Commentary.

9. Amendment: Section 1B1.2(a) is amended by deleting:

"Similarly, stipulations to additional offenses are treated as if the defendant had been convicted of separate counts charging those offenses."

and by inserting the following as additional subsections:

"(c) A conviction by a plea of guilty or nolo contendere containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s).

(d) A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit."

The Commentary to § 1B1.2 captioned "Application Notes" is amended in the second paragraph of Note 1 by deleting:

"Similarly, if the defendant pleads guilty to one robbery but admits the elements of two additional robberies as part of a plea agreement, the guideline applicable to three robberies is to be applied."

and by inserting the following as additional Notes:

"4. Subsections (c) and (d) address circumstances in which the provisions of Chapter Three, Part D (Multiple Counts) are to be applied although there may be only one count of conviction. Subsection (c) provides that in the case of a stipulation to the commission of additional offense(s), the guidelines are to be applied as if the defendant had been convicted of an additional count for each of the offenses stipulated. For example, if the defendant is convicted of one count of robbery but, as part of a plea agreement, admits to having committed two additional robberies, the guidelines are to be applied as if the defendant had been convicted of three counts of robbery. Subsection (d) provides that a conviction on a conspiracy count charging conspiracy to commit more than one offense is treated as if the defendant had been convicted of a separate conspiracy count for

each offense that he conspired to commit. For example, where a conviction on a single count of conspiracy establishes that the defendant conspired to commit three robberies, the guidelines are to be applied as if the defendant had been convicted on one count of conspiracy to commit the first robbery, one count of conspiracy to commit the second robbery, and one count of conspiracy to commit the third robbery.

5. Particular care must be taken in applying subsection (d) because there are cases in which the jury's verdict does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense. Note, however, if the object offenses specified in the conspiracy count would be grouped together under § 3D1.2(d) (e.g., a conspiracy to steal three government checks) it is not necessary to engage in the foregoing analysis, because § 1B1.3(a)(2) governs consideration of the defendant's conduct."

Reason for Amendment: This amendment creates a new subsection (subsection (d)) to specify that a conviction of conspiracy to commit more than one offense is treated for guideline purposes as if the defendant had been convicted of a separate conspiracy count for each offense that the defendant conspired to commit. The current instruction found only at Application Note 9 of § 3D1.2 is inadequate. For consistency, material now contained at § 1B1.2(a) concerning stipulations to having committed additional offenses is moved to a new subsection (subsection (c)).

Additional Commentary (Application Note 5) is provided to address cases in which the jury's verdict does not specify how many or which offenses were the object of the conspiracy of which the defendant was convicted. Compare U.S. v. Johnson, 713 F.2d 633, 645-46 (11th Cir. 1983) [conviction stands if there is sufficient proof with respect to any one of the objectives], with U.S. v. Tarnopol, 561 F.2d 466 (3d Cir. 1977) [failure of proof with respect to any one of the objectives renders the conspiracy conviction invalid]. In order to maintain consistency with other § 1B1.2(a) determinations, this decision should be governed by a reasonable doubt standard. A higher standard of proof should govern the creation of what is, in effect, a new count of conviction for the purposes of Chapter Three, Part D (Multiple Counts). Because the guidelines do not explicitly establish standards of proof, the proposed new application note calls upon the court to determine which offense(s) was the object of the conspiracy as if it were

"sitting as a trier of fact." The foregoing determination is not required, however, in the case of offenses that are grouped together under § 3D1.2(d) (e.g., fraud and theft) because § 1B1.3(a)(2) governs consideration of the defendant's conduct.

§ 1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

10. *Amendment:* Section 1B1.3 is amended in subsection (a)(3) by deleting "or risk of harm", and by deleting "if the harm or risk was caused intentionally, recklessly or by criminal negligence, and all harm or risk" and inserting in lieu thereof "and all harm".

Section 1B1.3 is amended by deleting subsection (a)(4) in its entirety, by renumbering subsection (a)(5) as (a)(4), and by inserting "and" at the end of subsection (a)(3) immediately following the semicolon.

The Commentary to § 1B1.3 captioned "Background" is amended by deleting the fifth paragraph in its entirety as follows:

"Subsection (a)(4) requires consideration of the defendant's 'state of mind, intent, motive or purpose in committing the offense.' The defendant's state of mind is an element of the offense that may constitute a specific offense characteristic. See, e.g., § 2A1.4 (Involuntary Manslaughter) (distinction made between recklessness and criminal negligence). The guidelines also incorporate broader notions of intent or purpose that are not elements of the offense, e.g., whether the offense was committed for profit, or for the purpose of facilitating a more serious offense. Accordingly, such factors must be considered in determining the applicable guideline range."

and by inserting in lieu thereof:

"Subsection (a)(4) requires consideration of any other information specified in the applicable guideline. For example, § 2A1.4 (Involuntary Manslaughter) specifies consideration of the defendant's state of mind; § 2K1.4 (Arson; Property Damage By Use of Explosives) specifies consideration of the risk of harm created."

Reason for Amendment: The purpose of this amendment is to delete language pertaining to "risk of harm" and "state of mind" as unnecessary. Cases in which the guidelines specifically address risk of harm or state of mind are covered in the amended guideline under subsection (a)(4) (formerly subsection (a)(5)). In addition, the amendment deletes reference to harm committed "intentionally, recklessly, or by criminal negligence" as unnecessary and potentially confusing.

11. *Amendment:* Section 1B1.3 is amended by deleting "The conduct that is relevant to determining the applicable guideline range includes that set forth below."

Section 1B1.3(b) is amended by deleting:

"(b) Chapter Four (Criminal History and Criminal Livelihood). To determine the criminal history category and the applicability of the career offender and criminal livelihood guidelines, the court shall consider all conduct relevant to a determination of the factors enumerated in the respective guidelines in Chapter Four," and inserting in lieu thereof:

"(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines."

The Commentary to § 1B1.3 captioned "Background" is amended in the second paragraph by deleting "Chapter Four" and inserting in lieu thereof "Chapters Four and Five", and by deleting "that Chapter" and inserting in lieu thereof "those Chapters".

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

12. *Amendment:* The Commentary to § 1B1.3 captioned "Application Notes" is amended in Note 1 by deleting:

"If the conviction is for conspiracy, it includes conduct in furtherance of the conspiracy that was known to or was reasonably foreseeable by the defendant. If the conviction is for solicitation, misprision or accessory after the fact, it includes all conduct relevant to determining the offense level for the underlying offense that was known to or reasonably should have been known by the defendant. See generally §§ 2X1.1-2X4.1."

and inserting in lieu thereof:

"In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant is 'otherwise accountable' also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant. Because a count may be broadly worded and include the conduct of many participants over a substantial period of time, the scope of the jointly-undertaken criminal activity, and hence relevant conduct, is not necessarily the same for every participant. Where it is established that the conduct was neither within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake, such conduct is not included in establishing the defendant's offense level under this guideline.

In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant is 'otherwise accountable' includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.

Illustrations of Conduct for Which the Defendant Is Accountable

a. Defendant A, one of ten off-loaders hired by Defendant B, was convicted of importation of marihuana, as a result of his assistance in off-loading a boat containing a one-ton shipment of marihuana. Regardless of the number of bales of marihuana that he actually unloaded, and notwithstanding any claim on his part that he was neither aware of, nor could reasonably foresee, that the boat contained this quantity of marihuana, Defendant A is held accountable for the entire one-ton quantity of marihuana on the boat because he aided and abetted the unloading, and hence the importation, of the entire shipment.

b. Defendant C, the getaway driver in an armed bank robbery in which \$15,000 is taken and a teller is injured, is convicted of the substantive count of bank robbery. Defendant C is accountable for the money taken because he aided and abetted the taking of the money. He is accountable for the injury inflicted because he participated in concerted criminal conduct that he could reasonably foresee might result in the infliction of injury.

c. Defendant D pays Defendant E a small amount to forge an endorsement on an \$800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain \$15,000 worth of merchandise. Defendant E is convicted of forging the \$800 check. Defendant E is not accountable for the \$15,000 because the fraudulent scheme to obtain \$15,000 was beyond the scope of, and not reasonably foreseeable in connection with, the criminal activity he jointly undertook with Defendant D.

d. Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains \$20,000. Defendant G fraudulently obtains \$35,000. Each is convicted of mail fraud. Each defendant is accountable for the entire amount (\$55,000) because each aided and abetted the other in the fraudulent conduct. Alternatively, because Defendants F and G engaged in concerted criminal activity, each is accountable for the entire \$55,000 loss because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable.

e. Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J may be included in a single count charging conspiracy to import marihuana. For the purposes of determining the offense level under this guideline, Defendant J is accountable for the entire single shipment of marihuana he conspired to help import and any acts or omissions in furtherance of the importation that were reasonably foreseeable. He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I if those acts were beyond the scope of, and not reasonably foreseeable in connection with, the criminal activity he agreed to jointly

undertake with Defendants H and I (i.e., the importation of the single shipment of marihuana)."

Reason for Amendment: The purpose of this amendment is to clarify the definition of conduct for which the defendant is "otherwise accountable."

§ 1B1.5 Interpretation of References to Other Offense Guidelines

13. *Amendment:* Section 1B1.5 is amended by deleting "adjustments for", and by inserting "and cross references" immediately before the period at the end of the sentence.

The Commentary to § 1B1.5 captioned "Application Note" is amended in Note 1 by inserting "and cross references" immediately before "as well as the base offense level".

Reason for Amendment: The purpose of this amendment is to clarify the guideline and Commentary.

14. *Amendment:* The Commentary to § 1B1.5 captioned "Application Note" is amended in Note 1 by deleting: "If the victim was vulnerable, the adjustment from § 3A1.1 (Vulnerable Victim) also would apply."

Reason for Amendment: The purpose of this amendment is to delete an unnecessary sentence. No substantive change is made.

§ 1B1.9 Petty Offenses

15. *Amendment:* Section 1B1.9 is amended in the title by deleting "Petty Offenses" and inserting in lieu thereof "Class B or C Misdemeanors and Infractions".

Section 1B1.9 is amended by deleting "(petty offense)".

The Commentary to § 1B1.9 captioned "Application Notes" is amended in the first sentence of Note 1 by deleting "petty offense" and inserting in lieu thereof "Class B or C misdemeanor or an infraction", in the second sentence of Note 1 by deleting "A petty offense is any offense for which the maximum sentence that may be imposed does not exceed six months' imprisonment," and inserting in lieu thereof "A Class B misdemeanor is any offense for which the maximum authorized term of imprisonment is more than thirty days but not more than six months; a Class C misdemeanor is any offense for which the maximum term of imprisonment is more than five days but not more than thirty days; an infraction is any offense for which the maximum authorized term of imprisonment is not more than five days.", in the first sentence of Note 2 by deleting "petty offenses" and inserting in lieu thereof "Class B or C misdemeanors or infractions", in the second sentence of Note 2 by deleting "petty" and inserting in lieu thereof

"such", in the third sentence of Note 2 by deleting "petty offense" and inserting in lieu thereof "Class B or C misdemeanor or infraction" and, in Note 3 by deleting:

"3. All other provisions of the guidelines should be disregarded to the extent that they purport to cover petty offenses."

The Commentary to § 1B1.9 captioned "Background" is amended by deleting:

"voted to adopt a temporary amendment to exempt all petty offenses from the coverage of the guidelines. Consequently, to the extent that some published guidelines may appear to cover petty offenses, they should be disregarded even if they appear in the Statutory Index",

and inserting in lieu thereof "exempted all Class B and C misdemeanors and infractions from the coverage of the guidelines".

Reason for Amendment: Section 7089 of the Anti-Drug Abuse Act of 1988 revises the definition of a petty offense so that it no longer exactly corresponds with a Class B or C misdemeanor or infraction. Under the revised definition, a Class B or C misdemeanor or infraction that has an authorized fine of more than \$5,000 for an individual (or more than \$10,000 for an organization) will not be a petty offense. This legislative revision does not affect the maximum terms of imprisonment authorized. The maximum authorized term of imprisonment remains controlled by the grade of the offense (i.e., the maximum term of imprisonment remains five days for an infraction, thirty days for a Class C misdemeanor, and six months for a Class B misdemeanor). Because the statutory grade of the offense (i.e., a Class B or C misdemeanor or an infraction) is the more relevant definition for guideline purposes, this amendment deletes the references in § 1B1.9 to "petty offenses" and in lieu thereof inserts references to "Class B and C misdemeanors and infractions."

In addition, this amendment converts the wording of the Commission's emergency amendment at § 1B1.9 (effective June 15, 1988) into that appropriate for a permanent amendment.

§ 2A1.1 First Degree Murder

16. *Amendment:* The Commentary to § 2A1.1 captioned "Statutory Provision" is amended by deleting "Provision" and inserting in lieu thereof "Provisions", and by inserting "; 21 U.S.C. 848(e)" at the end immediately before the period.

The Commentary to § 2A1.1 captioned "Application Note" is amended in the caption by deleting "Note" and inserting

in lieu thereof "Notes", and by inserting the following additional note:

"2. If the defendant is convicted under 21 U.S.C. 848(e), a sentence of death may be imposed under the specific provisions contained in that statute. This guideline applies when a sentence of death is not imposed."

The Commentary to § 2A1.1 captioned "Background" is amended by deleting the word "statute" and inserting in lieu thereof "18 U.S.C. 1111" and by adding the following immediately after the first sentence:

"Prior to the applicability of the Sentencing Reform Act of 1984, a defendant convicted under this statute and sentenced to life imprisonment could be paroled (see 18 U.S.C. 4205(a)). Because of the abolition of parole by that Act, the language of 18 U.S.C. 1111(b) (which was not amended by the Act) appears on its face to provide a mandatory minimum sentence of life imprisonment for this offense. Other provisions of the Act, however, classify this offense as a Class A felony (see 18 U.S.C. 3559(a)(1)), for which a term of imprisonment of any period of time is authorized as an alternative to imprisonment for the duration of the defendant's life (see 18 U.S.C. 3559(b), 3581(b)(1), as amended); hence, the relevance of the discussion in Application Note 1, supra, regarding circumstances in which a sentence less than life may be appropriate for a conviction under this statute."

The Commentary to § 2A1.1 captioned "Background" is amended by inserting at the end thereof:

"The maximum penalty authorized under 21 U.S.C. 848(e) is death or life imprisonment. If a term of imprisonment is imposed, the statutorily required minimum term is twenty years."

Reason for Amendment: The purpose of this amendment is to incorporate new first-degree murder offenses created by Section 7001 of the Anti-Drug Abuse Act of 1988 where the death penalty is not imposed. This amendment also clarifies the existing Commentary to this guideline.

§ 2A2.1 Assault With Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder

17. *Amendment:* Section 2A2.1 is amended in subsection (b)(2)(B) by deleting "a firearm or a dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)", and in subsection (b)(2)(C) by deleting "a firearm or other dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)".

Reason for Amendment: The purposes of this amendment are to clarify that a firearm is a type of dangerous weapon and to remove the inconsistency in the language between specific offense

characteristic subdivisions (b)(2)(B) and (b)(2)(C).

18. *Amendment:* Section 2A2.1(b)(3) is amended by inserting the following additional subdivisions:

"(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels; or

(E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels."

The Commentary to § 2A2.1 captioned "Application Notes" is amended by deleting "Notes" from the caption and inserting in lieu thereof "Note", and by deleting:

"2. If the degree of bodily injury falls between two injury categories, use of the intervening level (i.e., interpolation) is appropriate."

Reason for Amendment: The purpose of this amendment is to provide intermediate adjustment levels for the degree of bodily injury.

§ 2A2.2 Aggravated Assault

19. *Amendment:* Section 2A2.2 is amended in subsection (b)(2)(B) by deleting "a firearm or a dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)", and in subsection (b)(2)(C) by deleting "a firearm or other dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)".

Reason for Amendment: The purposes of this amendment are to clarify that a firearm is a type of dangerous weapon and to remove the inconsistency in language between specific offense characteristic subdivisions (b)(2)(B) and (b)(2)(C).

20. *Amendment:* Section 2A2.2(b)(3) is amended by inserting the following additional subdivisions:

"(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels; or

(E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels."

The Commentary to § 2A2.2 captioned "Application Notes" is amended by deleting:

"3. If the degree of bodily injury falls between two injury categories, use of the intervening level (i.e., interpolation) is appropriate."

and by renumbering Note 4 as Note 3.

Reason for Amendment: The purpose of this amendment is to provide intermediate adjustment levels for the degree of bodily injury.

§ 2A2.3 Minor Assault

21. *Amendment:* Section 2A2.3(a)(1) is amended by deleting "striking, beating,

or wounding" and inserting in lieu thereof "physical contact, or if a dangerous weapon (including a firearm) was possessed and its use was threatened".

The Commentary to § 2A2.3 captioned "Application Notes" is amended by deleting:

"2. 'Striking, beating, or wounding' means conduct sufficient to violate 18 U.S.C. 113(d)."

and inserting in lieu thereof:

"2. Definitions of 'firearm' and 'dangerous weapon' are found in the Commentary to § 1B1.1 (Application Instructions)."

The Commentary to § 2A2.3 captioned "Background" is amended by deleting "The distinction for striking, beating, or wounding reflects the statutory distinction found in 18 U.S.C. 113(d) and (e)."

Reason for Amendment: This amendment eliminates the phrase "striking, wounding, or beating" (a statutory phrase dealing with a petty offense) in favor of "physical contact," a clearer standard. The amendment also provides an enhanced offense level for the case in which a weapon is possessed and its use is threatened.

22. *Amendment:* The Commentary to § 2A2.3 captioned "Statutory Provisions" is amended by deleting "113(d), 113(e)."

Reason for Amendment: The purpose of this amendment is to delete references to petty offenses.

§ 2A2.4 Obstructing or Impeding Officers

23. *Amendment:* The Commentary to § 2A2.4 captioned "Application Notes" is amended in Note 1 by deleting: "Do not apply § 3A1.2 (Official Victim).", and by inserting as the last sentence: "Therefore, do not apply § 3A1.2 (Official Victim) unless subsection (c) requires the offense level to be determined under § 2A2.2 (Aggravated Assault)."

Reason for Amendment: The purpose of this amendment is to clarify the Commentary.

24. *Amendment:* Section 2A2.4(b)(1) is amended by deleting "striking, beating, or wounding", and inserting in lieu thereof "physical contact, or if a dangerous weapon (including a firearm) was possessed and its use was threatened".

The Commentary to § 2A2.4 is amended by deleting:

"2. 'Striking, beating, or wounding' is discussed in the Commentary to § 2A2.3 (Minor Assault)."

and inserting in lieu thereof:

"2. Definitions of 'firearm' and 'dangerous weapon' are found in the Commentary to § 1B1.1 (Application Instructions)."

Reason for Amendment: This amendment eliminates the phrase "striking, wounding, or beating" (a statutory phrase dealing with a petty offense) in favor of "physical contact," a clearer standard. The amendment also provides an enhanced offense level for the case in which a weapon is possessed and its use is threatened.

§ 2A3.1 Criminal Sexual Abuse; Attempt or Assault with the Intent to Commit Criminal Sexual Abuse

25. *Amendment:* Section 2A3.1(b)(1) is amended by deleting:

"criminal sexual abuse was accomplished as defined in 18 U.S.C. § 2241",

and inserting in lieu thereof:

"offense was committed by the means set forth in 18 U.S.C. 2241 (a) or (b)".

The Commentary to § 2A3.1 captioned "Application Notes" is amended in Note 2 by deleting:

"'Accomplished as defined in 18 U.S.C. 2241' means accomplished by force, threat, or other means as defined in 18 U.S.C. 2241 (a) or (b) (i.e., by using force against that person; by threatening or placing that other person",

and inserting in lieu thereof:

"'The means set forth in 18 U.S.C. 2241 (a) or (b)' are: by using force against the victim; by threatening or placing the victim",

by deleting the parenthesis immediately before the period at the end of the Note, and by inserting at the end of the Note the following additional sentence:

"This provision would apply, for example, where any dangerous weapon was used, brandished, or displayed to intimidate the victim."

The Commentary to § 2A3.1 captioned "Background" is amended in the fifth sentence of the first paragraph by deleting the comma immediately following "force" and inserting in lieu thereof a semicolon, and by deleting "kidnapping," and inserting in lieu thereof "or kidnapping"; and in the last sentence of the last paragraph by deleting "serious physical" and inserting in lieu thereof "permanent, life-threatening, or serious bodily".

Reason for Amendment: The purpose of this amendment is to clarify the guideline and Commentary.

26. *Amendment:* Section 2A3.1(b)(4) is amended by inserting immediately before the period at the end of the sentence:

"; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels".

Reason for Amendment: The purpose of this amendment is to provide an intermediate adjustment level for degree of bodily injury.

§ 2A3.2 Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts

27. Amendment: The Commentary to § 2A3.2 captioned "Statutory Provision" and "Background" is amended by deleting "2243" wherever it appears and inserting in lieu thereof "2243(a)".

The Commentary to § 2A3.2 captioned "Background" is amended by deleting "statutory rape, i.e.,", and by deleting "victim's incapacity to give lawful consent" and inserting in lieu thereof "age of the victim".

Reason for Amendment: The purposes of this amendment are to clarify that the relevant factor is the age of the victim, and to provide a more specific reference to the underlying statute.

§ 2A3.3 Criminal Sexual Abuse of a Ward (Statutory Rape) or Attempt to Commit Such Acts

28. Amendment: Section 2A3.3 is amended in the title by deleting "(Statutory Rape)".

The Commentary to § 2A3.3 captioned "Statutory Provision" is amended by deleting "§ 2243" and inserting in lieu thereof "§ 2243(b)".

Reason for Amendment: The purposes of this amendment are to delete inapt language from the title and to provide a more specific reference to the underlying statute.

§ 2A3.4 Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

29. Amendment: Section 2A3.4 and the accompanying commentary is amended by deleting:

"§ 2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

(a) Base Offense Level: 6
(b) Specific Offense Characteristics
(1) If the abusive sexual contact was accomplished as defined in 18 U.S.C. 2241 (including, but not limited to, the use or display of any dangerous weapon), increase by 9 levels.

(2) If the abusive sexual contact was accomplished as defined in 18 U.S.C. 2242, increase by 4 levels.

Commentary

Statutory Provisions: 18 U.S.C. 2244, 2245.

Application Notes:

1. "Accomplished as defined in 18 U.S.C. 2241" means accomplished by force, threat, or other means as defined in 18 U.S.C. 2241(a) or (b) (i.e., by using force against that person; by threatening or placing that other person in fear that any person will be subject to death, serious bodily injury, or kidnapping; by rendering the victim unconscious; or by

administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct).

2. "Accomplished as defined in 18 U.S.C. 2242" means accomplished by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or when the victim is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.

Background: This section covers abusive sexual contact not amounting to criminal sexual abuse (criminal sexual abuse is covered under § 2A3.1-3.3). Enhancements are provided for the use of force or threats. The maximum term of imprisonment authorized by statute for offenses covered in this section is five years (if accomplished as defined in 18 U.S.C. 2241), three years (if accomplished as defined in 18 U.S.C. 2242), and six months otherwise. The base offense level applies to conduct that is consensual.",

and inserting in lieu thereof:

"§ 2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

(a) Base Offense Level:

(1) 16, if the offense was committed by the means set forth in 18 U.S.C. 2241(a) or (b);

(2) 12, if the offense was committed by the means set forth in 18 U.S.C. 2242;

(3) 10, otherwise.

(b) Specific Offense Characteristics

(1) If the victim had not attained the age of twelve years, increase by 4 levels; but if the resulting offense level is less than 16, increase to level 16.

(2) If the base offense level is determined under subsection (a)(1) or (2), and the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by 2 levels.

Commentary

Statutory Provision: 18 U.S.C. 2244(a) (1), (2), (3).

Application Notes:

1. "The means set forth in 18 U.S.C. 2241(a) or (b)" are by using force against the victim; by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct.

2. "The means set forth in 18 U.S.C. 2242" are by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or by victimizing an individual who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.

Background: This section covers abusive sexual contact not amounting to criminal sexual abuse (criminal sexual abuse is covered under § 2A3.1-3.3). Alternative base offense levels are provided to take account of the different means used to commit the offense. Enhancements are provided for victimizing children or minors. The enhancement under subsection (b)(2) does not apply, however, where the base offense level is determined under subsection (a)(3) because an element of the offense to which that offense level applies is that the victim had attained the age of twelve years but had not attained the age of sixteen years. For cases involving consensual sexual contact involving victims that have achieved the age of 12 but are under age 16, the offense level assumes a substantial difference in sexual experience between the defendant and the victim. If the defendant and the victim are similar in sexual experience, a downward departure may be warranted. For such cases, the Commission recommends a downward departure to the equivalent of an offense level of 6."

Reason for Amendment: The purposes of the amendment are to make the offense levels under this guideline consistent with the structure of related guidelines (§§ 2A3.1, 2A3.2, 2G1.2, 2G2.1, and 2G2.2) and to reflect the increased maximum sentences for certain conduct covered by this guideline.

The amendment increases all offense levels, but in particular provides enhanced punishment for victimization of minors and children. The differentials between the alternative offense levels in this amendment are consistent with §§ 2A3.1 and 2G1.2. The enhancements that relate to the age of the victim are consistent with those in §§ 2G1.2, 2G2.1, and 2G2.2.

§ 2A4.1 Kidnapping, Abduction, Unlawful Restraint

30. Amendment: Section 2A4.1(b)(2) is amended by inserting immediately before the period at the end of the sentence:

"; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels".

Reason for Amendment: The purpose of this amendment is to provide an intermediate adjustment level for the degree of bodily injury.

§ 2A5.2 Interference with Flight Crew Member or Flight Attendant

31. Amendment: The Commentary to § 2A5.2 captioned "Application Note" is amended by deleting:

"Application Note:

1. If an assault occurred, apply the most analogous guideline from Part A, Subpart 2

(Assault) if the offense level under that guideline is greater."

Reason for Amendment: The purpose of this amendment is to simplify the guideline by deleting redundant material.

§ 2A5.3 Committing Certain Crimes Aboard Aircraft

32. Amendment: The Commentary to § 2A5.3 captioned "Application Notes" is amended in Note 1 by deleting "that the defendant is convicted of violating" and inserting in lieu thereof "of which the defendant is convicted".

Reason for Amendment: The purpose of this amendment is to clarify the Commentary.

§ 2B1.1 Larceny, Embezzlement, and Other Forms of Theft

33. Amendment: Section 2B1.1(b)(1) is amended by deleting:

	Increase in Level
"Loss:	
(A) \$100 or less	No increase.
(B) \$101-\$1,000	Add 1.
(C) \$1,001-\$2,000	Add 2.
(D) \$2,001-\$5,000	Add 3.
(E) \$5,001-\$10,000	Add 4.
(F) \$10,001-\$20,000	Add 5.
(G) \$20,001-\$50,000	Add 6.
(H) \$50,001-\$100,000	Add 7.
(I) \$100,001-\$200,000	Add 8.
(J) \$200,001-\$500,000	Add 9.
(K) \$500,001-\$1,000,000	Add 10.
(L) \$1,000,001-\$2,000,000	Add 11.
(M) \$2,000,001-\$5,000,000	Add 12.
(N) Over \$5,000,000	Add 13."

and inserting in lieu thereof:

	Increase in Level
"Loss (Apply the Greatest):	
(A) \$100 or less	No increase.
(B) More than \$100	Add 1.
(C) More than \$1,000	Add 2.
(D) More than \$2,000	Add 3.
(E) More than \$5,000	Add 4.
(F) More than \$10,000	Add 5.
(G) More than \$20,000	Add 6.
(H) More than \$40,000	Add 7.
(I) More than \$70,000	Add 8.
(J) More than \$120,000	Add 9.
(K) More than \$200,000	Add 10.
(L) More than \$350,000	Add 11.
(M) More than \$500,000	Add 12.
(N) More than \$800,000	Add 13.
(O) More than \$1,500,000	Add 14.
(P) More than \$2,500,000	Add 15.
(Q) More than \$5,000,000	Add 16.
(R) More than \$10,000,000	Add 17.
(S) More than \$20,000,000	Add 18.
(T) More than \$40,000,000	Add 19.
(U) More than \$80,000,000	Add 20."

Reason for Amendment: The purposes of this amendment are to conform the

theft and fraud loss tables to the tax evasion table in order to remove an unintended inconsistency between these tables in cases where the amount is greater than \$40,000, to increase the offense levels for larger losses to provide additional deterrence and better reflect the seriousness of the conduct, and to eliminate minor gaps in the loss table.

34. Amendment: Section 2B1.1(b)(6) is amended by deleting "organized criminal activity" and inserting in lieu thereof "an organized scheme to steal vehicles or vehicle parts".

The Commentary to § 2B1.1 captioned "Application Notes" is amended by deleting:

"8. 'Organized criminal activity' refers to operations such as car theft rings or 'chop shops,' where the scope of the activity is clearly significant."

and inserting in lieu thereof:

"8. Subsection (b)(6), referring to an 'organized scheme to steal vehicles or vehicle parts,' provides an alternative minimum measure of loss in the case of an ongoing, sophisticated operation such as an auto theft ring or 'chop shop.' 'Vehicles' refers to all forms of vehicles, including aircraft and watercraft."

The Commentary to § 2B1.1 captioned "Background" is amended by deleting:

"A minimum offense level of 14 is provided for organized criminal activity, i.e., operations such as car theft rings or 'chop shops,' where the scope of the activity is clearly significant but difficult to estimate. The guideline is structured so that if reliable information enables the court to estimate a volume of property loss that would result in a higher offense level, the higher offense level would govern."

and inserting in lieu thereof:

"A minimum offense level of 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial (i.e., the value of the stolen property, combined with an enhancement for 'more than minimal planning' would itself result in an offense level of at least 14), but the value of the property is particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of 'organized scheme' is used as an alternative to 'loss' in setting the offense level."

Reason for Amendment: The purpose of this amendment is to clarify the coverage of a specific offense characteristic.

35. Amendment: The Commentary to § 2B1.1 captioned "Background" is amended in the first paragraph by deleting "§ 5A1.1" and inserting in lieu thereof "Chapter Five, Part A".

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

§ 2B1.2 Receiving Stolen Property

36. Amendment: Section 2B1.2 is amended in the title by inserting "Transporting, Transferring, Transmitting, or Possessing" immediately after "Receiving".

Section 2B1.2(b)(3)(A) is amended by inserting "receiving and" immediately before "selling".

The Commentary to § 2B1.2 captioned "Application Notes" is amended by deleting Note 1 as follows:

1. "If the defendant is convicted of transporting stolen property, either § 2B1.1 or this guideline would apply, depending upon whether the defendant stole the property."

and by renumbering Notes 2 and 3 as Notes 1 and 2 respectively.

Reason for Amendment: The purpose of this amendment is to clarify the nature of the cases to which this guideline applies.

37. Amendment: Section 2B1.2 is amended by renumbering subsection (b)(4) as (b)(5), and by inserting a new subsection (b)(4) as follows:

"(4) If the property included undelivered United States mail and the offense level as determined above is less than level 6, increase to level 6."

The Commentary to § 2B1.2 captioned "Application Notes", as amended, is further amended by inserting the following as an additional Note:

"3. 'Undelivered United States mail' means mail that has not actually been received by the addressee or his agent (e.g., it includes mail that is in the addressee's mail box)."

Reason for Amendment: The purpose of this amendment is to add a specific offense characteristic where stolen property involved "undelivered mail" to conform to § 2B1.1.

38. Amendment: Section 2B1.2(b)(5) [formerly (b)(4)] is amended by deleting "organized criminal activity" and inserting in lieu thereof "an organized scheme to receive stolen vehicles or vehicle parts".

The Commentary to § 2B1.2 captioned "Application Notes" is amended by inserting the following as an additional Note:

"4. Subsection (b)(5), referring to an 'organized scheme to receive stolen vehicles or vehicle parts,' provides an alternative minimum measure of loss in the case of an ongoing, sophisticated operation such as an auto theft ring or 'chop shop.' 'Vehicles' refers to all forms of vehicles, including aircraft and watercraft. See Commentary to § 2B1.1 (Larceny, Embezzlement, and other Forms of Theft)."

Reason for Amendment: The purpose of this amendment is to clarify the coverage of a specific offense characteristic.

§ 2B2.1 Burglary of Residence

39. *Amendment:* Section 2B2.1(b)(2) is amended in the first column of the table by deleting:

"Loss....."	Increase in Level
(A) \$2,500 or less.....	no increase
(B) \$2,501-\$10,000.....	add 1
(C) \$10,001-\$50,000.....	add 2
(D) \$50,001-\$250,000.....	add 3
(E) \$250,001-\$1,000,000.....	add 4
(F) \$1,000,001-\$5,000,000.....	add 5
(G) more than \$5,000,000.....	add 6"

and inserting in lieu thereof:

"Loss (Apply the Greatest)....."	Increase in Level
(A) \$2,500 or less.....	no increase
(B) More than \$2,500.....	add 1
(C) More than \$10,000.....	add 2
(D) More than \$50,000.....	add 3
(E) More than \$250,000.....	add 4
(F) More than \$800,000.....	add 5
(G) More than \$1,500,000.....	add 6
(H) More than \$2,500,000.....	add 7
(I) More than \$5,000,000.....	add 8"

Reason for Amendment: The purposes of this amendment are to eliminate minor gaps in the loss table and to conform the offense levels for larger losses to the amended loss table at § 2B1.1.

40. *Amendment:* Section 2B2.1(b)(4) is amended by deleting "a firearm or other dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)".

The Commentary to § 2B2.1 captioned "Application Notes" is amended in Note 4 by deleting "with respect to a firearm or other dangerous weapon" and inserting in lieu thereof "to possession of a dangerous weapon (including a firearm) that was".

Reason for Amendment: The purpose of this amendment is to clarify the guideline and Commentary.

§ 2B2.2 Burglary of Other Structures

41. *Amendment:* Section 2B2.2(b)(4) is amended by deleting "a firearm or other dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)".

The Commentary to § 2B2.2 captioned "Application Notes" is amended in Note 4 by deleting "with respect to a firearm", and inserting in lieu thereof "to possession of a dangerous weapon (including a firearm) that was".

Reason for Amendment: The purpose of this amendment is to clarify the guideline and Commentary.

§ 2B2.3 Trespass

42. *Amendment:* Section 2B2.3(b)(2) is amended by deleting "a firearm or other dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)".

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

43. *Amendment:* Section 2B2.3(b) is amended by deleting "Characteristic" and inserting in lieu thereof "Characteristics".

The Commentary to § 2B2.3 captioned "Statutory Provisions" is amended by deleting "Provisions" and inserting in lieu thereof "Provision", and by deleting "18 U.S.C. 1382, 1854" and inserting in lieu thereof "42 U.S.C. 7270b".

Reason for Amendment: The purposes of this amendment are to correct a clerical error, to delete a reference to a petty offense and an incorrect statutory reference, and to insert an additional statutory reference.

§ 2B3.1 Robbery

44. *Amendment:* Section 2B3.1(a) is amended by deleting "18" and inserting in lieu thereof "20".

Section 2B3.1(b) is amended by deleting subsections (1) and (2) and inserting in lieu thereof:

"(1) If the offense involved robbery or attempted robbery of the property of a financial institution or post office, increase by 2 levels.

(2)(A) If a firearm was discharged, increase by 5 levels; (B) if a dangerous weapon (including a firearm) was otherwise used, increase by 4 levels; (C) if a dangerous weapon (including a firearm) was brandished, displayed, or possessed, increase by 3 levels; or (D) if an express threat of death was made, increase by 2 levels."

and by inserting the following additional subsection:

"(6) If the loss exceeded \$10,000, increase the offense level as follows:

	Increase in level
Loss (apply the greatest):	
(A) \$10,000 or less.....	No increase.
(B) More than \$10,000.....	Add 1.
(C) More than \$50,000.....	Add 2.
(D) More than \$250,000.....	Add 3.
(E) More than \$800,000.....	Add 4.
(F) More than \$1,500,000.....	Add 5.
(G) More than \$2,500,000.....	Add 6.
(H) More than \$5,000,000.....	Add 7"

The Commentary to § 2B3.1 captioned "Application Notes" is amended by deleting Note 2 and inserting in lieu thereof:

"2. When an object that appeared to be a dangerous weapon was brandished, displayed, or possessed, treat the object as a dangerous weapon for the purposes of subsection (b)(2)(C)."

The Commentary to § 2B3.1 captioned "Background" is amended in the first paragraph by deleting the third sentence.

Reason for Amendment: The purposes of this amendment are to increase the offense level for robbery to better reflect the seriousness of the offense and past practice, to provide an increased enhancement for the robbery of the property of a financial institution or post office, to provide an enhancement for an express threat of death, and to provide that an object that appeared to be a dangerous weapon is to be treated as a dangerous weapon for the purposes of subsection (b)(2)(C).

45. *Amendment:* Section 2B3.1(b)(3) is amended by inserting the following additional subdivisions:

"(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels; or

(E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels."

The Commentary to § 2B3.1 captioned "Application Notes" is amended by deleting:

"4. If the degree of bodily injury falls between two injury categories, use of the intervening level (i.e., interpolation) is appropriate."

and by renumbering Notes 5-8 as 4-7, respectively.

Reason for Amendment: The purpose of this amendment is to provide intermediate adjustment levels for the degree of bodily injury.

§ 2B3.2 Extortion by Force or Threat of Injury or Serious Damage

46. *Amendment:* Section 2B3.2 is amended in subsection (b)(2)(B) by deleting "a firearm or a dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)", and in subsection (b)(2)(C) by deleting "a firearm or other dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)".

Reason for Amendment: The purposes of this amendment are to clarify that a firearm is a type of dangerous weapon and to remove the inconsistency in language between specific offense characteristic subdivisions (b)(2)(B) and (b)(2)(C).

47. *Amendment:* Section 2B3.2(b)(3) is amended by inserting the following additional subdivisions:

"(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels; or

(E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels."

The Commentary to § 2B3.2 captioned "Application Notes" is amended by deleting:

"4. If the degree of bodily injury falls between two injury categories, use of the intervening level (i.e., interpolation) is appropriate."

and by renumbering Notes 5 and 6 as 4 and 5, respectively.

Reason for Amendment: The purpose of this amendment is to provide intermediate adjustment levels for the degree of bodily injury.

§ 2B3.3 Blackmail and Similar Forms of Extortion

48. *Amendment:* Section 2B3.3(b) is amended by deleting "Characteristics" and inserting in lieu thereof "Characteristic".

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

§ 2B5.1 Offenses Involving Counterfeit Obligations of the United States

49. *Amendment:* Section 2B5.1 is amended in the title by inserting "Bearer" immediately before "Obligations".

The Commentary to § 2B5.1 captioned "Application Notes" is amended by renumbering Note 2 as Note 3, and by inserting the following as a new Note 2:

"2. 'Counterfeit,' as used in this section, means an instrument that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety. Offenses involving genuine instruments that have been altered are covered under § 2B5.2."

The Commentary to § 2B5.1 captioned "Application Notes" is amended in the renumbered Note 3 by deleting ", paste corners of notes on notes of a different denomination,".

Reason for Amendment: The purpose of this amendment is to clarify the coverage and operation of this guideline. The amendment revises the title of § 2B5.1 to make the coverage of the guideline clear from the title, and adopts the definition of "counterfeit" used in 18 U.S.C. § 513. "Altered" obligations (e.g., the corner of a note of one denomination pasted on a note of a different denomination) are covered under § 2B5.2.

§ 2B5.2 Forgery; Offenses Involving Counterfeit Instruments Other Than Obligations of the United States

50. *Amendment:* Section 2B5.2 is amended in the title by inserting "Altered or" immediately following "Involving" and by inserting "Counterfeit Bearer" immediately following "Other than".

Reason for Amendment: The purpose of this amendment is to clarify the coverage of this guideline.

§ 2B6.1 Altering or Removing Motor Vehicle Identification Numbers, or Trafficking in Motor Vehicles or Parts With Altered or Obliterated Identification Numbers

51. *Amendment:* Section 2B6.1(b) is amended by renumbering subsection (b)(2) as (b)(3) and inserting the following as a new subsection (b)(2):

"(2) If the defendant was in the business of receiving and selling stolen property, increase by 2 levels."

Reason for Amendment: The purpose of this amendment is to resolve an inconsistency between this section and § 2B1.2 created by the lack of an enhancement in this section for a person in the business of selling stolen property. Currently, a defendant convicted under the statutes covered by this section, which are expressly designed to cover trafficking in motor vehicles or parts with altered or obliterated identification numbers, could receive a lower offense level than if convicted of transportation or receipt of stolen property. This amendment eliminates this inconsistency by adding a 2 level increase if the defendant was in the business of selling stolen property. Two levels rather than four levels is the applicable increase to conform to § 2B1.2 because the base offense level of § 2B6.1 already incorporates the adjustment for more than minimal planning.

52. *Amendment:* Section 2B6.1(b)(3) [formerly (b)(2)] is amended by deleting "organized criminal activity" and inserting in lieu thereof "an organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts".

The Commentary to § 2B6.1 captioned "Application Note" is amended by deleting:

"1. See Commentary to § 2B1.1 (Larceny, Embezzlement, and other Forms of Theft) regarding the adjustment in subsection (b)(2) for organized criminal activity, such as car theft rings and 'chop shop' operations."

and inserting in lieu thereof:

"1. Subsection (b)(3), referring to an 'organized scheme to steal vehicles or

vehicle parts, or to receive stolen vehicles or vehicle parts,' provides an alternative minimum measure of loss in the case of an ongoing, sophisticated operation such as an auto theft ring or 'chop shop.' 'Vehicles' refers to all forms of vehicles, including aircraft and watercraft. See Commentary to § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)."

Reason for Amendment: The purpose of this amendment is to clarify the coverage of a specific offense characteristic.

53. *Amendment:* Section 2B6.1(b) is amended by deleting "Characteristic" and inserting in lieu thereof "Characteristics".

The Commentary to § 2B6.1 captioned "Statutory Provisions" and "Background" is amended by deleting "2320" wherever it appears and inserting in lieu thereof in each instance "2321".

Reason for Amendment: The purpose of this amendment is to correct clerical errors.

§ 2C1.1 Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right

§ 2C1.2 Offering, Giving, Soliciting, or Receiving a Gratuity

54. *Amendment:* Section 2C1.1(b)(1) is amended by deleting "action received" and inserting in lieu thereof "benefit received, or to be received,".

The Commentary to § 2C1.1 captioned "Application Notes" is amended in Note 2 in the first sentence by deleting "action received" and inserting in lieu thereof "benefit received, or to be received," and by deleting "action (i.e., benefit or favor)" and inserting in lieu thereof "benefit"; in the second sentence by deleting "action received in return" and inserting in lieu thereof "benefit received or to be received," and by deleting "such action" and inserting in lieu thereof "such benefit"; and in the third sentence by deleting "action" and inserting in lieu thereof "benefit".

Reason for Amendment: The purpose of this amendment is to clarify the guideline and Commentary.

55. *Amendment:* Section 2C1.1(b) is amended by deleting "(1)" and "(2)" and inserting in lieu thereof "(A)" and "(B)" respectively; and by deleting "Apply the greater" and inserting in lieu thereof:

"(1) If the offense involved more than one bribe, increase by 2 levels.

(2) If more than one applies, use the greater:".

The Commentary to § 2C1.1 captioned "Application Notes" is amended by deleting the text of Note 6 and inserting in lieu thereof:

"Related payments that, in essence, constitute a single bribe (e.g., a number of installment payments for a single action) are to be treated as a single bribe, even if charged in separate counts."

Section 2C1.2(b) is amended by deleting "(1)" and "(2)" and inserting in lieu thereof "(A)" and "(B)" respectively; and by deleting "Apply the greater" and inserting in lieu thereof:

"(1) If the offense involved more than one gratuity, increase by 2 levels.

(2) If more than one applies, use the greater:"

The Commentary to § 2C1.2 captioned "Application Notes" is amended by deleting the text of Note 4 and inserting in lieu thereof:

"Related payments that, in essence, constitute a single gratuity (e.g., separate payments for airfare and hotel for a single vacation trip) are to be treated as a single gratuity, even if charged in separate counts."

Section 3D1.2(d) is amended in the listing of offense sections in the third paragraph by deleting "§ 2C1.1", and in the listing of offense sections in the second paragraph by inserting in order by section number "§§ 2C1.1, 2C1.2;"

Reason for Amendment: Under the current bribery guideline, there is no enhancement for repeated instances of bribery if the conduct involves the same course of conduct or common scheme or plan and the same victim (as frequently is the case where the government is the victim) because such cases are grouped under § 3D1.2(b). In contrast, the fraud and theft guidelines generally provide a 2-level increase in cases of repeated instances under the second prong of the "more than minimal planning" definition.

Unlike the theft and fraud guidelines, it is arguable that the value of any bribe that was part of the same course of conduct or a common scheme or plan as the offense of conviction, but not included in the count of conviction, is excluded from consideration. This is because § 1B1.3(a)(2), which authorizes consideration of conduct not expressly included in the offense of conviction but part of the same course of conduct or common scheme or plan, applies only to offenses grouped under § 3D1.2(d). Thus, if the defendant pleads to one count of a bribery offense involving one \$10,000 bribe in satisfaction of a 15 count indictment involving an additional \$80,000 in separate bribes that were part of the same course of conduct, the current bribery guideline, unlike the theft and fraud guidelines, would not take into account the additional \$80,000, and there would be no increase for repeated instances.

The current guideline may also create various anomalies because the multiple count rule (which applies only where the offenses are not grouped under § 3D1.2(b)) increases the offense level differently than the monetary table. For example, an elected public official who takes three unrelated \$200 bribes has an offense level of 21; the same defendant who took two unrelated \$500,000 bribes would have an offense level of 20.

The amendment addresses the above issues. A specific offense characteristic is added to provide a 2-level increase where the offense involved more than one bribe or gratuity. In addition, such offenses will be grouped under § 3D1.2(d) which allows for aggregation of the amount of the bribes from the same course of conduct or common scheme or plan under § 1B1.3(a)(2) (as in theft and fraud offenses).

56. Amendment: The Commentary to § 2C1.1 captioned "Background" is amended in the eighth paragraph by deleting "extortions, conspiracies, and attempts" and inserting in lieu thereof "extortion, or attempted extortion."

Reason for Amendment: This amendment corrects a technical error. This section expressly covers extortion and attempted extortion; conspiracy is covered through the operation of § 2X1.1.

§ 2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)

57. Amendment: Section 2D1.1(a) is amended by deleting:

"(a) Base Offense Level:

(1) 43, for an offense that results in death or serious bodily injury with a prior conviction for a similar drug offense; or

(2) 38, for an offense that results in death or serious bodily injury and involved controlled substances (except Schedule III, IV, and V controlled substances and less than: (A) fifty kilograms of marijuana, (B) ten kilograms of hashish, and (C) one kilogram of hashish oil); or

(3) For any other offense, the base offense level is the level specified in the Drug Quantity Table below."

and inserting in lieu thereof:

"(a) Base Offense Level (Apply the greatest):

(1) 43, if the defendant is convicted under 21 U.S.C. 841 (b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. 960 (b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. 841 (b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. 960 (b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death

or serious bodily injury resulted from use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below."

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 1 by deleting "Similar drug offense" as used in § 2D1.1(a)(1) means a prior conviction as described in 21 U.S.C. 841(b) or 962(b).", and inserting in lieu thereof "Mixture or substance" as used in this guideline has the same meaning as in 21 U.S.C. 841."

Reason for Amendment: The purpose of this amendment is to provide that subsections (a) and (b) apply only in the case of a conviction under circumstances specified in the statutes cited. The amendment also clarifies that the term "mixture or substance" has the same meaning as it has in the statute.

58. Amendment: Section 2D1.1(b) is amended by deleting "a firearm or other dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)".

Reason for Amendment: The purpose of the amendment is to clarify the guideline.

59. Amendment: Section 2D1.1 is amended by deleting the "Drug Quantity Table" in its entirety, including the title and footnotes, and inserting in lieu thereof:

"(c) Drug Quantity Table

Controlled substances and quantity*	Base offense level
(1) 300 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); 1500 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); 15 KG or more of Cocaine Base; 300 KG or more of PCP, or 30 KG or more of Pure PCP; 300 KG or more of Methamphetamine, or 30 KG or more of Pure Methamphetamine; 3 KG or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); 120 KG or more of Fentanyl; 30 KG or more of a Fentanyl Analogue; 300,000 KG or more of Marijuana; 60,000 KG or more of Hashish; 6,000 KG or more of Hashish Oil.	Level 42.
(2) At least 100 KG but less than 300 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);	Level 40.

Controlled substances and quantity*	Base offense level	Controlled substances and quantity*	Base offense level	Controlled substances and quantity*	Base offense level
At least 500 KG but less than 1500 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);		At least 100 G but less than 300 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);		(7) At least 700 G but less than 1 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);	Level 30.
At least 5 KG but less than 15 KG of Cocaine Base;		At least 4 KG but less than 12 KG of a Fentanyl;		At least 3.5 KG but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
At least 100 KG but less than 300 KG of PCP, or at least 10 KG but less than 30 KG of Pure PCP;		At least 1 KG but less than 3 KG of Fentanyl Analogue;		At least 35 G but less than 50 G of Cocaine Base;	
At least 100 KG but less than 300 KG of Methamphetamine, or at least 10 KG but less than 30 KG of Pure Methamphetamine;		At least 10,000 KG but less than 30,000 KG of Marihuana;		At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of Pure PCP;	
At least 1 KG but less than 3 KG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);		At least 2,000 KG but less than 6,000 KG of Hashish;		At least 700 G but less than 1 KG of Methamphetamine, or at least 70 G but less than 100 G of Pure Methamphetamine;	
At least 40 KG but less than 120 KG of Fentanyl;		At least 200 KG but less than 600 KG of Hashish Oil.		At least 7 G but less than 10 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);	
At least 10 KG but less than 30 KG of a Fentanyl Analogue;		(5) At least 3 KG but less than 10 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates)	Level 34.	At least 280 G but less than 400 G of Fentanyl;	
At least 100,000 KG but less than 300,000 KG of Marihuana;		At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);		At least 70 G but less than 100 G of a Fentanyl Analogue;	
At least 20,000 KG but less than 60,000 KG of Hashish;		At least 150 G but less than 500 G of Cocaine Base;		At least 700 KG but less than 1,000 KG of Marihuana;	
At least 2,000 KG but less than 6,000 KG of Hashish Oil.		At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of Pure PCP;		At least 140 KG but less than 200 KG of Hashish;	
(3) At least 30 KG but less than 100 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);	Level 38.	At least 3 KG but less than 10 KG of Methamphetamine, or at least 300 G but less than 1 KG of Pure Methamphetamine;		At least 14 KG but less than 20 KG of Hashish Oil.	
At least 150 KG but less than 500 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);		At least 30 G but less than 100 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);		(8) At least 400 G but less than 700 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);	Level 28.
At least 1.5 KG but less than 5 KG of Cocaine Base;		At least 1.2 KG but less than 4 KG of Fentanyl;		At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
At least 30 KG but less than 100 KG of PCP, or at least 3 KG but less than 10 KG of Pure PCP;		At least 300 G but less than 1 KG of Fentanyl Analogue;		At least 20 G but less than 35 G of Cocaine Base;	
At least 30 KG but less than 100 KG of Methamphetamine, or at least 3 KG but less than 10 KG of Pure Methamphetamine;		At least 3,000 KG but less than 10,000 KG of Marihuana		At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of Pure PCP;	
At least 300 KG but less than 1 KG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);		At least 600 KG but less than 2,000 KG of Hashish;		At least 400 G but less than 700 G of Methamphetamine, or at least 40 G but less than 70 G of Pure Methamphetamine;	
At least 12 KG but less than 40 KG of Fentanyl;		At least 60 KG but less than 200 KG of Hashish Oil.		At least 4 G but less than 7 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);	
At least 3 KG but less than 10 KG of a Fentanyl Analogue;		(6) At least 1 KG but less than 3 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);	Level 32.	At least 160 G but less than 280 G of Fentanyl;	
At least 30,000 KG but less than 100,000 KG of Marihuana;		At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);		At least 40 G but less than 70 G of a Fentanyl Analogue;	
At least 6,000 KG but less than 20,000 KG of Hashish;		At least 50 G but less than 150 G of Cocaine Base;		At least 400 KG but less than 700 KG of Marihuana;	
At least 600 KG but less than 2,000 KG of Hashish Oil.		At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of Pure PCP;		At least 80 KG but less than 140 KG of Hashish;	
(4) At least 10 KG but less than 30 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);	Level 36.	At least 1 KG but less than 3 KG of Methamphetamine, or at least 100 G but less than 300 G of Pure Methamphetamine;		At least 8 KG but less than 14 KG of Hashish Oil.	
At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);		At least 10 G but less than 30 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);		(9) At least 100 G but less than 400 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);	Level 26.
At least 500 G but less than 1.5 KG of Cocaine Base;		At least 400 G but less than 1.2 KG of Fentanyl;		At least 500 G but less than 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of Pure PCP;		At least 100 G but less than 300 G of a Fentanyl Analogue;		At least 5 G but less than 20 G of Cocaine Base;	
At least 10 KG but less than 30 KG of Methamphetamine, or at least 1 KG but less than 3 KG of Pure Methamphetamine;		At least 1,000 KG but less than 3,000 KG of Marihuana;		At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of Pure PCP;	
		At least 200 KG but less than 600 KG of Hashish;		At least 100 G but less than 400 G of Methamphetamine, or at least 10 G but less than 40 G of Pure Methamphetamine;	
		At least 20 KG but less than 60 KG of Hashish Oil.			

Controlled substances and quantity*	Base offense level	Controlled substances and quantity*	Base offense level	Controlled substances and quantity*	Base offense level
At least 1 G but less than 4 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);	Level 24.	(12) At least 40 G but less than 60 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);	Level 18.	At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of Pure PCP;	Level 14.
At least 40 G but less than 160 G of Fentanyl;		At least 200 G but less than 300 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);		At least 10 G less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Pure Methamphetamine;	
At least 10 G but less than 40 G of a Fentanyl Analogue;		At least 2 G but less than 3 G of Cocaine Base;		At least 100 MG but less than 200 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);	
At least 100 KG but less than 400 KG of Marihuana;		At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of Pure PCP;		At least 4 G but less than 8 G of Fentanyl;	
At least 20 KG but less than 80 KG of Hashish;		At least 40 G but less than 60 G of Methamphetamine, or at least 4 G but less than 6 G of Pure Methamphetamine;		At least 1 G but less than 2 G of a Fentanyl Analogue;	
At least 2 KG but less than 8 KG of Hashish Oil;		At least 400 MG but less than 600 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);		At least 10 KG but less than 20 KG of Marihuana;	
(10) At least 80 G but less than 100 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);		At least 16 G but less than 24 G of Fentanyl;		At least 2 KG but less than 5 KG of Hashish;	
At least 400 G but less than 500 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);		At least 4 G but less than 6 G of a Fentanyl Analogue;		At least 200 G but less than 500 G of Hashish Oil;	
At least 4 G but less than 5 G of Cocaine Base;		At least 40 KG but less than 60 KG of Marihuana;		At least 5 KG but less than 10 KG of Schedule I or I Depressants or Schedule III substances.	
At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of Pure PCP;		At least 8 KG but less than 12 KG of Hashish;		(15) At least 5 G but less than 10 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);	
At least 80 G but less than 100 G of Methamphetamine, or at least 8 G but less than 10 G of Pure Methamphetamine;	Level 22.	At least 800 G but less than 1.2 KG of Hashish Oil;	Level 16.	At least 25 G but less than 50 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 12.
At least 800 MG but less than 1 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);		20 KG or more of Schedule I or II Depressants or Schedule III substances.		At least 250 MG less than 500 MG of Cocaine Base;	
At least 32 G but less than 40 G of Fentanyl;		(13) At least 20 G but less than 40 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);		At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of Pure PCP;	
At least 8 G but less than 10 G of Fentanyl Analogue;		At least 100 G but less than 200 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);		At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Pure Methamphetamine;	
At least 80 KG but less than 100 KG of Marihuana;		At least 1 G but less than 2 G of Cocaine Base;		At least 50 MG but less than 100 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);	
At least 16 KG but less than 20 KG of Hashish;		At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of Pure PCP;		At least 2 G but less than 4 G of Fentanyl;	
At least 1.6 KG but less than 2 KG of Hashish Oil;		At least 20 G but less than 40 G of Methamphetamine, or at least 2 G but less than 4 G of Pure Methamphetamine;		At least 500 MG but less than 1 G of a Fentanyl Analogue;	
(11) At least 60 G but less than 80 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);		At least 200 MG but less than 400 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);		At least 5 KG but less than 10 KG of Marihuana;	
At least 300 G but less than 400 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);		At least 8 G but less than 16 G of Fentanyl;		At least 1 KG but less than 2 KG of Hashish;	
At least 3 G but less than 4 G of Cocaine Base;		At least 2 G but less than 4 G of a Fentanyl Analogue;		At least 100 G but less than 200 G of Hashish Oil;	
At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of Pure PCP;	Level 22.	At least 20 KG but less than 40 KG of Marihuana;	Level 16.	At least 2.5 KG but less than 5 KG of Schedule I or II Depressants or Schedule III substances.	
At least 60 G but less than 80 G of Methamphetamine, or at least 6 G but less than 8 G of Pure Methamphetamine;		At least 5 KG but less than 8 KG of Hashish;		(16) Less than 5 G Heroin (or the equivalent amount of other Schedule I or II Opiates);	Level 12.
At least 600 MG but less than 800 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);		At least 500 G but less than 800 G of Hashish Oil;		Less than 25 G Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
At least 24 G but less than 32 G of Fentanyl;		At least 10 KG but less than 20 KG of Schedule I or I Depressants or Schedule II substances.		Less than 250 MG of Cocaine Base;	
At least 6 G but less than 8 G of Fentanyl Analogue;		(14) At least 10 G but less than 20 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);		Less than 5 G of PCP, or less than 500 MG of Pure PCP;	
At least 60 KG but less than 80 KG of Marihuana;		At least 50 G but less than 100 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);		Less than 5 G of Methamphetamine, or less than 500 MG of Pure Methamphetamine;	
At least 12 KG but less than 16 KG of Hashish;		At least 500 MG but less than 1 G of Cocaine Base;		Less than 50 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);	
At least 1.2 KG but less than 1.6 KG of Hashish Oil;					

Controlled substances and quantity*	Base offense level
Less than 2 G of Fentanyl; Less than 500 MG of a Fentanyl Analogue; At least 2.5 KG but less than 5 KG of Marijuana; At least 500 G but less than 1 KG of Hashish; At least 50 G but less than 100 G of Hashish Oil; At least 1.25 KG but less than 2.5 KG of Schedule I or II Depressants or Schedule III substances; 20 KG or more of Schedule IV substances.	
(17) At least 1 KG but less than 2.5 KG of Marijuana; At least 200 G but less than 500 G of Hashish; At least 20 G but less than 50 G of Hashish Oil; At least 500 G but less than 1.25 KG of Schedule I or II Depressants or Schedule III substances; At least 8 KG but less than 20 KG of Schedule IV substances.	Level 10.
(18) At least 250 G but less than 1 KG of Marijuana; At least 50 G but less than 200 G of Hashish; At least 5 G but less than 20 G of Hashish Oil; At least 125 G but less than 500 G of Schedule I or II Depressants or Schedule III substances; At least 2 KG but less than 8 KG of Schedule IV substances; 20 KG or more of Schedule V substances.	Level 8.
(19) Less than 250 G of Marijuana; Less than 50 G of Hashish; Less than 5 G of Hashish Oil; Less than 125 G of Schedule I or II Depressants or Schedule III substances; Less than 2 KG of Schedule IV substances; Less than 20 KG of Schedule V substances.	Level 6.

*Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level. In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined by the entire weight of the mixture or substance or the offense level determined by the weight of the pure PCP or methamphetamine, whichever is greater.

In the case of an offense involving marijuana plants, if the offense involved (A) 50 or more marijuana plants, treat each plant as equivalent to 1 KG of marijuana; (B) fewer than 50 marijuana plants, treat each plant as equivalent to 100 G of marijuana. Provided, however, that if the actual weight of the marijuana is greater, use the actual weight of the marijuana.

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 9 by inserting immediately before the period at the end of the first sentence:

"except in the case of PCP or methamphetamine for which the guideline itself provides for the consideration of purity (see the footnote to the Drug Quantity Table)";

and by deleting:

"Congress provided an exception to purity considerations in the case of phenylcyclidine (PCP). 21 U.S.C. 841(b)(1)(A). The legislation designates amounts of pure PCP and mixtures in establishing mandatory sentences. The first row of the table illustrates this distinction as one kilogram of PCP or 100 grams of pure PCP. Allowance for higher sentences based on purity is not appropriate for PCP."

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10 by inserting "methamphetamine, fentanyl," immediately following "i.e., heroin, cocaine, PCP," and by deleting:

"one gram of a substance containing methamphetamine, a Schedule I stimulant, is to be treated as the equivalent of two grams of a substance containing cocaine in applying the Drug Quantity Table."

and inserting in lieu thereof:

"one gram of a substance containing oxycodone, a Schedule I opiate, is to be treated as the equivalent of five grams of a substance containing heroin in applying the Drug Quantity Table."

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10, in the subdivision of the "Drug Equivalency Tables" captioned "Cocaine and Other Schedule I & II Stimulants" by deleting "2.0 gm. of cocaine/0.4 gm of heroin" immediately following "1 gm of Methamphetamine =" and inserting in lieu thereof "5.0 gm of cocaine/1.0 gm of heroin", and by deleting:

"1 gm of Phenylacetone/P₂P (amphetamine precursor)=0.375 gm of cocaine/0.075 gm of heroin

1 gm of Phenylacetone/P₂P (methamphetamine precursor)=0.833 gm of cocaine/0.167 gm of heroin",

and inserting in lieu thereof:

"1 gm Phenylacetone/P₂P (when possessed for the purpose of manufacturing methamphetamine)=2.08 gm of cocaine/0.418 gm of heroin

1 gm Phenylacetone/P₂P (in any other case)=0.375 gm of cocaine/0.075 gm of heroin".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10, in the subdivision of the "Drug Equivalency Tables" captioned "Schedule I Marijuana" by deleting:

"1 Marijuana/Cannabis Plant=0.1 gm of heroin/100 gm of marijuana".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note

10 in the "Drug Equivalency Tables" by deleting "Other Schedule I or II Substances" and inserting in lieu thereof "Schedule I or II Depressants".

The Commentary to 2D1.1 captioned "Background" is amended in the third paragraph by deleting "with two asterisks represent mandatory minimum sentences established by the Anti-Drug Abuse Act of 1986. These levels reflect sentences" and inserting in lieu thereof "at levels 26 and 32 establish guideline ranges", and by deleting "requirement" and inserting in lieu thereof "minimum".

Reason for Amendment: The purposes of this amendment are to expand the Drug Quantity Table to reflect offenses involving extremely large quantities of controlled substances, to eliminate minor gaps in the Drug Quantity Table, to reflect the statutory change with respect to methamphetamine (Section 8470 of the Anti-Drug Abuse Act of 1988) by inserting specific references to the quantity of this substance for each offense level set forth in the table, to reflect the statutory change with respect to fifty or more marijuana plants (Section 8479 of the Anti-Drug Abuse Act of 1988), to correct anomaly in the relationship of hashish oil to hashish in levels 6 and 8 of the Drug Quantity Table, to delete an unnecessary footnote, and to clarify the operation of the guideline.

60. *Amendment:* The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10 in the section of the "Drug Equivalency Tables" captioned "Schedule I or II Opiates" on the line beginning "piperidyl] Propanamide]" by deleting "31.25 gm" and inserting in lieu thereof "2.5 gm"; on the line beginning "1 gm of Alpha-Methylfentanyl" by deleting "100 gm" and inserting in lieu thereof "10 gm"; and on the line beginning "1 gm of 3-Methylfentanyl" by deleting "125 gm" and inserting in lieu thereof "10 gm".

Reason for Amendment: The purpose of this amendment is to conform the equivalency for fentanyl and fentanyl analogues to that set forth in the Drug Quantity Table and statute.

61. *Amendment:* The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10 in the section of "Dosage Equivalency Table" captioned "Hallucinogens" by deleting "STP (DOM) Dimethoxyamphetamine" and inserting in lieu thereof "2, 5-Dimethoxy-4-methylamphetamine (STP, DOM)".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10 in the section of the "Dosage Equivalency Table" in the section

captioned "Stimulants" by deleting "Preludin 25 mg" and inserting in lieu thereof "Phenmetrazine (Preludin) 75 mg".

Reason for Amendment: The purposes of this amendment are to substitute generic names for two substances and to conform the dosage of Phenmetrazine to that currently being manufactured.

62. *Amendment:* The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10 in the "Drug Equivalency Tables" in the subdivision captioned "Schedule III Substances" by deleting:

"1 gm of Thiohexethal = 2 mg of heroin/2 gm of marihuana",

in the "Dosage Equivalency Table" in the subdivision captioned "Hallucinogens" by deleting:

"Anhalamine 300 mg",
"Anhalonide 300 mg",
"Anhalonine 300 mg",
"Lophophorine 300 mg",
"Pellotine 300 mg",

and in the "Dosage Equivalency Table" in the subdivision captioned "Depressants" by deleting:

"Brallobarbitol 30 mg",
"Eldoral 100 mg",
"Eunarcon 100 mg",
"Hexethel 100 mg",
"Thiohexethal 60 mg".

Reason for Amendment: The purpose of this amendment is to delete substances that either are not controlled substances or are no longer manufactured.

63. *Amendment:* The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10 in the "Drug Equivalency Tables" in the subdivision captioned "Cocaine and Other Schedule I and II Stimulants" by inserting in the appropriate place in alphabetical order:

"1 gm of 4-Methylaminorex ('Euphoria')=0.5 gm of cocaine/0.1 gm of heroin",
"1 gm of Methylphenidate (Ritalin)=0.5gm of cocaine/0.1 gm of heroin",

in the subdivision captioned "LSD, PCP, and Other Schedule I and II Hallucinogens" by inserting in the appropriate place in alphabetical order:

"1 gm of 3, 4-Methylenedioxy-N-ethylamphetamine/MDEA=.03 gm of heroin or PCP",

in the subdivision captioned "Schedule III Substances" by inserting in the appropriate place (by alphabetical order):

"1 gm of Benzphetamine=4 mg of heroin/4 gm of marihuana",

and in the "Dosage Equivalency Table" in the subdivision captioned "Depressants" by inserting in the appropriate place in alphabetical order:

"Glutethimide (Doriden) 500 mg".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10 in the "Dosage Equivalency Table" by inserting the following immediately after the subdivision captioned "Depressants":

"Marihuana—1 marihuana cigarette 0.5 gm".

Reason for Amendment: The purpose of this amendment is to make the Drug Equivalency Tables and Dosage Equivalency Table more comprehensive.

64. *Amendment:* The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10 in "Drug Equivalency Tables" in the subdivision captioned "Schedule III Substances" by deleting "2 mg of heroin/2 gm of marihuana" immediately following "1 gm of Glutethimide=" and inserting in lieu thereof "0.4 mg of heroin/0.4 gm of marihuana", and by deleting:

"1 gm of Paregoric=2 mg of heroin/2 gm of marihuana

1 gm of Hydrocodone Cough Syrups=2 mg of heroin/2 gm of marihuana",

and inserting in lieu thereof:

"1 ml of Paregoric=0.25 mg of heroin/0.25 gm of marihuana

1 ml of Hydrocodone Cough Syrup=1 mg of heroin/1 gm of marihuana".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10 in the "Dosage Equivalency Table" in the subdivision captioned "Hallucinogens" by deleting ".1 mg" in the line beginning "LSD (Lysergic acid diethylamide)" and inserting in lieu thereof ".05 mg", by deleting "LSD tartrate .05 mg", by deleting "Peyote 12 mg", and by inserting in the appropriate place in alphabetical order:

"Peyote (dry) 12 gm",
"Peyote (wet) 120 gm",
"Psilocybe mushrooms (dry) 5 gm",
"Psilocybe mushrooms (wet) 50 gm".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10 in the "Dosage Equivalency Table" in the subdivision captioned "Stimulants" by deleting "Ethylamphetamine HCL 12 mg" and "Ethylamphetamine SO₄ 12 mg", by deleting "Amphetamines" and inserting in lieu thereof "Amphetamine", by deleting "Methamphetamines" and inserting in lieu thereof "Methamphetamine", and by deleting "Methamphetamine combinations 5 mg".

Reason for Amendment: The purposes of this amendment are to provide more accurate approximations of the equivalencies and dosages for certain controlled substances, and to eliminate unnecessary references.

65. *Amendment:* The Commentary to § 2D1.1 captioned "Application Notes"

is amended in Note 10 in the subdivision of the "Drug Equivalency Tables" captioned "LSD, PCP, and Other Schedule I and II Hallucinogens" by deleting:

"1 gm of Liquid phencyclidine=0.1 gm of heroin or PCP".

Reason for Amendment: The purpose of this amendment is to delete an incorrect equivalency.

66. *Amendment:* The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10 in the "Drug Equivalency Tables" by inserting immediately following the caption "Cocaine and Other Schedule I and II Stimulants" and immediately following the caption "LSD, PCP, and Other Hallucinogens" in each instance "(and their immediate precursors)".

Reason for Amendment: The purpose of this amendment is to clarify the Commentary.

67. *Amendment:* The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10 by deleting:

"The following dosage equivalents for certain common drugs are provided by the Drug Enforcement Administration to facilitate the application of § 2D1.1 of the guidelines in cases where the number of doses, but not the weight of the controlled substances are known. The dosage equivalents provided in these tables reflect the amount of the pure drug contained in an average dose.

Dosage Equivalency Table",

and inserting in lieu thereof:

"11. If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose to estimate the total weight of the controlled substance (e.g., 100 doses of Bufotenine at 1 mg per dose=100 mg of Bufotenine). The Typical Weight Per Unit Table, prepared from information provided by the Drug Enforcement Administration, displays the typical weight per dose, pill, or capsule for common controlled substances.

Typical Weight Per Unit (Dose, Pill, or Capsule) Table".

The Commentary to § 2D1.1 captioned "Application Notes" is amended by renumbering the current Note 11 as Note 12.

Reason for Amendment: The purpose of this amendment is to clarify the Commentary.

68. *Amendment:* Section 2D1.1(b) is amended by inserting the following additional specific offense characteristic:

"(2) If the defendant is convicted of violating 21 U.S.C. 960(a) under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import the controlled

substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26."

The Commentary to § 2D1.1 captioned "Application Notes" is amended by inserting the following additional Note:

"13. If subsection (b)(2)(B) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).";

The Commentary to § 2D1.1 captioned "Background" is amended by inserting the following additional paragraph between the third and fourth paragraphs:

"Specific Offense Characteristic (b)(2) is mandated by Section 6453 of the Anti-Drug Abuse Act of 1988."

Reason for Amendment: The purpose of this amendment is to implement the directive to the Commission in Section 6453 of the Anti-Drug Abuse Act of 1988.

§ 2D1.2 Involving Juveniles in the Trafficking of Controlled Substances

§ 2D1.3 Distributing Controlled Substances to Individuals Younger than Twenty-One Years, to Pregnant Women, or Within 1000 Feet of a School or College

69. **Amendment:** Sections 2D1.2 and 2D1.3 are amended by deleting the guidelines and accompanying Commentary in their entirety and inserting in lieu thereof:

"§ 2D1.2 Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals

- (a) Base offense level (Apply the greatest):
 (1) 2 plus the offense level from § 2D1.1; or
 (2) 26, if the offense involved a person less than eighteen years of age; or
 (3) 13, otherwise.

Commentary

Statutory Provisions: 18 U.S.C. 845, 845a, 845b.

Background: This section implements the direction to the Commission in Section 6454 of the Anti-Drug Abuse Act of 1988.

Reason for Amendment: This amendment implements the directive in Section 6454 of the Anti-Drug Abuse Act of 1988, and expands the coverage of the guideline to include the provision of Sections 6458 and 6459 of that Act. The amendment also covers the provisions of 21 U.S.C. 845, 845a, and 845b not included in the statutory direction to the Commission.

§ 2D1.4 Attempts and Conspiracies

70. **Amendment:** The Commentary to § 2D1.4 captioned "Application Notes" is amended in Note 1 by deleting:

"Where the defendant was not reasonably capable of producing the negotiated amount,

the court may depart and impose a sentence lower than the sentence that would otherwise result";

and inserting in lieu thereof:

"However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing."

Reason for Amendment: Application Note 1 currently provides that the "weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount." The instruction then provides "Where the defendant was not reasonably capable of producing the negotiated amount the court may depart and impose a sentence lower than the sentence that would otherwise result." This provision may result in inflated offense levels in uncompleted offenses where a defendant is merely "puffing," even though the court is then authorized to address the situation by a downward departure. This amendment provides a more direct procedure for calculating the offense level where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount.

71. **Amendment:** The Commentary to § 2D1.4 captioned "Application Notes" is amended in Note 1 by deleting "the sentence should be imposed only on the basis of the defendant's conduct or the conduct of co-conspirators in furtherance of the conspiracy that was known to the defendant or was reasonably foreseeable" and inserting in lieu thereof "see Application Note 1 to § 1B1.3 (Relevant Conduct)."

Reason for Amendment: The purpose of this amendment is to conform this Commentary to the revision of § 1B1.3.

72. **Amendment:** Section 2D1.4(a) is amended by deleting "participating in an incomplete" and inserting in lieu thereof "a".

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

§ 2D1.5 Continuing Criminal Enterprise

73. **Amendment:** Section 2D1.5 is amended by deleting: "(a) Base Offense Level: 36" and inserting in lieu thereof:

- "(a) Base Offense Level (Apply the greater):
 (1) 4 plus the offense level from § 2D1.1 applicable to the underlying offense; or
 (2) 38."

The Commentary to § 2D1.5 captioned "Background" is amended in the first

paragraph by deleting "base offense level of 36" and inserting in lieu thereof "minimum base offense level of 38", and in the second paragraph by deleting "for second convictions" and inserting in lieu thereof "for the first conviction, a 30-year minimum mandatory penalty for a second conviction."

Reason for Amendment: The purpose of this amendment is to reflect the increased mandatory minimum penalty for this offense pursuant to Section 6481 of the Anti-Drug Abuse Act of 1988.

"§ 2D1.10 Endangering Human Life While Illegally Manufacturing a Controlled Substance

74. **Amendment:** Chapter Two, Part D is amended by inserting as an additional guideline the following:

§ 2D1.10. Endangering Human Life While Illegally Manufacturing a Controlled Substance

- (a) Base Offense Level (Apply the greater):
 (1) 3 plus the offense level from the Drug Quantity Table in § 2D1.1; or
 (2) 20.

Commentary

Statutory Provision: 21 U.S.C. 858."

Reason for Amendment: The purpose of this amendment is to create a guideline covering the new offense in Section 8301 of the Anti-Drug Abuse Act of 1988.

§ 2D2.3 Operating or Directing the Operation of a Common Carrier Under the Influence of Alcohol or Drugs

75. **Amendment:** Section 2D2.3 is amended by deleting: "(a) Base Offense Level: 8" and inserting in lieu thereof the following:

- "(a) Base Offense Level (Apply the greatest):
 (1) 26, if death resulted; or
 (2) 21, if serious bodily injury resulted; or
 (3) 13, otherwise.
 (b) Special Instruction:
 (1) If the defendant is convicted of a single count involving the death or serious bodily injury of more than one person, apply Chapter Three, Part D (Multiple Counts) as if the defendant had been convicted of a separate count for each such victim."

The Commentary to § 2D2.3 is amended by adding at the end:

Background: This guideline implements the directions to the Commission in Section 6842 of the Anti-Drug Abuse Act of 1988 (Pub. L. 100-690). Offenses that come within this guideline may vary widely with regard to harm and risk of harm. The offense levels assume that the offense involved the operation of a common carrier carrying a number of passengers, e.g., a bus. If no or only a few passengers were placed at risk, a downward departure may be warranted. If the offense resulted in the death or serious

bodily injury of a large number of persons, such that the resulting offense level under subsection (b) would not adequately reflect the seriousness of the offense, an upward departure may be warranted."

Reason for Amendment: The purpose of this amendment is to implement the directive to the Commission in Section 6482 of the Anti-Drug Abuse Act of 1988. In addition, the base offense level under subsection (a)(3) is increased to reflect the seriousness of the offense.

§ 2E1.1 Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations

76. Amendment: The Commentary to § 2E1.1 captioned "Application Notes" is amended by inserting the following as an additional Note:

"4. Certain conduct may be charged in the count of conviction as part of a 'pattern of racketeering activity' even though the defendant has previously been sentenced for that conduct. Where such previously imposed sentence resulted from a conviction prior to the last overt act of the instant offense, treat as a prior sentence under § 4A1.2(a)(1) and not as part of the instant offense. This treatment is designed to produce a result consistent with the distinction between the instant offense and criminal history found throughout the guidelines. If this treatment produces an anomalous result in a particular case, a guideline departure may be warranted."

Reason for Amendment: This amendment adds an application note to clarify the treatment of certain conduct for which the defendant previously has been sentenced as either part of the instant offense or prior criminal record.

§ 2E1.3 Violent Crimes in Aid of Racketeering Activity

77. Amendment: The Commentary to § 2E1.3 captioned "Statutory Provision" is amended by deleting "1952B" and inserting in lieu thereof "1959 (formerly 18 U.S.C. 1952B)".

Reason for Amendment: The purpose of this amendment is to reflect the redesignation of this statute.

§ 2E1.4 Use of Interstate Commerce Facilities in the Commission of Murder-For-Hire

78. Amendment: The Commentary to § 2E1.4 captioned "Statutory Provision" is amended by deleting "1952A" and inserting in lieu thereof "1958 (formerly 18 U.S.C. 1952A)".

Reason for Amendment: The purpose of this amendment is to reflect the redesignation of this statute.

§ 2E1.5 Hobbs Act Extortion or Robbery

79. Amendment: Section 2E1.5 is amended by deleting "the guideline

provision for extortion or robbery" and inserting in lieu thereof "§ 2B3.1 (Robbery), § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), § 2B3.3 (Blackmail and Similar Forms of Extortion), or § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right)".

The Commentary to § 2E1.5 captioned "Application Notes" is amended by deleting the entire text thereof, including the caption "Application Note."

Reason for Amendment: The purpose of this amendment is to move material from the Commentary to the guideline where it more appropriately belongs.

§ 2E2.1 Making, Financing, or Collecting an Extortionate Extension of Credit

80. Amendment: Section 2E2.1 is amended in subsection (b)(1)(B) by deleting "a firearm or a dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)", and in subsection (b)(1)(C) by deleting "a firearm or other dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)".

Reason for Amendment: The purposes of this amendment are to clarify that a firearm is a type of dangerous weapon and to remove the inconsistency in language between specific offense characteristic subdivisions (b)(1)(B) and (b)(1)(C).

81. Amendment: Section 2E2.1(b)(2) is amended by inserting the following additional subdivisions:

"(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels; or

"(E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels."

Reason for Amendment: The purpose of this amendment is to provide intermediate adjustment levels for the degree of bodily injury.

82. Amendment: Section 2E2.1(b)(3)(A) is amended by inserting "or" immediately following "4 levels;"

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

§ 2E5.1 Bribery or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan

83. Amendment: Section 2E5.1 is amended in the title by deleting "Bribery or Gratuity" and inserting in lieu thereof "Offering, Accepting, or Soliciting a Bribe or Gratuity".

Reason for Amendment: The purpose of amending the title of this section is to

ensure that attempts and solicitations are expressly covered by this guideline.

§ 2E5.2 Theft or Embezzlement from Employee Pension and Welfare Benefit Plans

84. Amendment: Section 2E5.2 is amended by deleting:

"(a) Base Offense Level: 4

(b) Specific Offense Characteristics

(1) If the offense involved more than minimal planning, increase by 2 levels.

(2) If the defendant had a fiduciary obligation under the Employee Retirement Income Security Act, increase by 2 levels.

(3) Increase by corresponding number of levels from the table in § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) according to the loss."

and inserting in lieu thereof:

"Apply § 2B1.1."

The Commentary to § 2E5.2 captioned "Application Notes" is amended by deleting:

"1. 'More than minimal planning' is defined in the Commentary to § 1B1.1 (Application Instructions). Valuation of loss is discussed in the Commentary to § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)." and

"3. If the adjustment for a fiduciary obligation at § 2E5.2(b)(2) is applied, do not apply the adjustment at § 3B1.3 (Abuse of a Position of Trust or Use of a Special Skill)."

and inserting in lieu of Note 1 the following:

"1. In the case of a defendant who had a fiduciary obligation under the Employee Retirement Income Security Act, an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) would apply."

The Commentary to § 2E5.2 captioned "Background" is amended by deleting:

"The base offense level corresponds to the base offense level for other forms of theft. Specific offense characteristics address whether a defendant has a fiduciary relationship to the benefit plan, the sophistication of the offense, and the scale of the offense."

Reason for Amendment: The purpose of this amendment is to simplify application of the guidelines.

§ 2E5.3 (False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act)

85. Amendment: § 2E5.3(a)(2) is amended by deleting "false records were used for criminal conversion of funds or a scheme" and inserting in lieu thereof "the offense was committed to facilitate or conceal a theft or embezzlement, or an offense".

The Commentary to § 2E5.3 captioned "Application Note" is amended by deleting:

"Application Note:

1. 'Criminal conversion' means embezzlement."

Reason for Amendment: The purpose of this amendment is to ensure that subsection (a)(2) covers any conduct engaged in for the purpose of facilitating or concealing a theft or embezzlement, or an offense involving a bribe or gratuity.

§ 2E5.4 (Embezzlement of Theft from Labor Unions in the Private Sector)

86. **Amendment:** Section 2E5.4 is amended by deleting:

"(a) Base Offense Level: 4

(b) Specific Offense Characteristics

(1) If the offense involved more than minimal planning, increase by 2 levels.

(2) If the defendant was a union officer or occupied a position of trust in the union, as set forth in 29 U.S.C. 501(a), increase by 2 levels.

(3) Increase by the number of levels from the table in § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) corresponding to the loss."

and inserting in lieu thereof:

"Apply § 2B1.1."

The Commentary to § 2E5.4 captioned "Application Notes" is amended by deleting:

"1. 'More than minimal planning' is defined in the Commentary to § 1B1.1 (Applicable Instructions). Valuation of loss is discussed in the Commentary to § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).

2. If the adjustment for being a union officer or occupying a position of trust in a union at § 2E5.4(b)(2) is applied, do not apply the adjustment at § 3B1.3 (Abuse of a Position of Trust or Use of a Special Skill)."

and inserting in lieu thereof:

"1. In the case of a defendant who was a union officer or occupied a position of trust in the union, as set forth in 29 U.S.C. 501(a), an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) would apply."

and by deleting in the caption "Notes" and inserting in lieu thereof "Note".

The Commentary to § 2E5.4 captioned "Background" is amended by deleting:

"The seriousness of this offense is determined by the amount of money taken, the sophistication of the offense, and the nature of the defendant's position in the union."

Reason for Amendment: The purpose of this amendment is to simplify application of the guidelines.

§ 2E5.5 Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act

87. **Amendment:** Section 2E5.5(a)(2) is amended by deleting "false records were used for criminal conversion of funds or a scheme" and inserting in lieu thereof "the offense was committed to facilitate or conceal a theft or embezzlement, or an offense".

Reason for Amendment: The purpose of this amendment is to ensure that subsection (a)(2) covers any conduct engaged in for the purpose of facilitating or concealing a theft or embezzlement, or an offense involving a bribe or gratuity.

§ 2F1.1 Fraud and Deceit

88. **Amendment:** Section 2F1.1(b)(1) is amended by deleting:

	Increase in level
"Loss:	
(A) \$2,000 or less	No increase.
(B) \$2,001-\$5,000	Add 1.
(C) \$5,001-\$10,000	Add 2.
(D) \$10,001-\$20,000	Add 3.
(E) \$20,001-\$50,000	Add 4.
(F) \$50,001-\$100,000	Add 5.
(G) \$100,001-\$200,000	Add 6.
(H) \$200,001-\$500,000	Add 7.
(I) \$500,001-\$1,000,000	Add 8.
(J) \$1,000,001-\$2,000,000	Add 9.
(K) \$2,000,001-\$5,000,000	Add 10.
(L) over \$5,000,000	Add 11."

and inserting in lieu thereof:

	Increase in level
"Loss (apply the greatest):	
(A) \$2,000 or less	No increase.
(B) More than \$2,000	Add 1.
(C) More than \$5,000	Add 2.
(D) More than \$10,000	Add 3.
(E) More than \$20,000	Add 4.
(F) More than \$40,000	Add 5.
(G) More than \$70,000	Add 6.
(H) More than \$120,000	Add 7.
(I) More than \$200,000	Add 8.
(J) More than \$350,000	Add 9.
(K) More than \$500,000	Add 10.
(L) More than \$800,000	Add 11.
(M) More than \$1,500,000	Add 12.
(N) More than \$2,500,000	Add 13.
(O) More than \$5,000,000	Add 14.
(P) More than \$10,000,000	Add 15.
(Q) More than \$20,000,000	Add 16.
(R) More than \$40,000,000	Add 17.
(S) More than \$80,000,000	Add 18."

Reason for Amendment: The purposes of this amendment are to conform the theft and fraud loss tables to the tax evasion table in order to remove an unintended inconsistency between these tables in cases where the amount is greater than \$40,000, to increase the offense levels for offenses with larger

losses to provide additional deterrence and better reflect the seriousness of the conduct, and to eliminate minor gaps in the loss table.

89. **Amendment:** The Commentary to § 2F1.1 captioned "Application Notes" is amended beginning in Note 14 by deleting:

"In such instances, although § 2F1.1 applies, a departure may be warranted.

15. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state law where a fraudulent insurance claim was mailed might be prosecuted as mail fraud. In such cases the most analogous guideline (in the above case, § 2K1.4) is to be applied."

and by inserting at the end of Note 14:

"In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state arson offense where a fraudulent insurance claim was mailed might be prosecuted as mail fraud. Where the indictment or information setting forth the count of conviction (or a stipulation as described in § 1B1.2(a)) establishes an offense more aptly covered by another guideline, apply that guideline rather than § 2F1.1. Otherwise, in such cases, § 2F1.1 is to be applied, but a departure from the guidelines may be considered."

The Commentary to § 2F1.1 captioned "Application Notes" is amended in the second sentence of Note 14 by deleting "in which" and inserting in lieu thereof "for which".

Reason for Amendment: The purposes of this amendment are to ensure that this guideline is interpreted in a manner consistent with § 1B1.2 and to correct a clerical error.

90. **Amendment:** Section 2F1.1(b)(2) is amended by deleting "; (B)" and inserting in lieu thereof ", or (B)", and by deleting "; (C) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; or (D) violation of any judicial or administrative order, injunction, decree or process; increase by 2 levels, but if the result is less than level 10, increase to level 10" and inserting in lieu thereof ", increase by 2 levels".

Section 2F1.1(b)(3) is renumbered as (b)(5), and the following are inserted as new subsections:

"(3) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, or (B) violation of any judicial or administrative order, injunction, decree or process, increase by 2 levels. If the

resulting offense level is less than level 10, increase to level 10.

(4) If the offense involved the conscious or reckless risk of serious bodily injury, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13."

The Commentary to § 2F1.1 captioned "Statutory Provisions" is amended by inserting "1031," immediately following "1029".

The Commentary to § 2F1.1 captioned "Application Notes" is amended in Note 4 by deleting "(b)(2)(C)" and inserting in lieu thereof "(b)(3)(A)", in Note 5 by deleting "(b)(2)(D)" and inserting in lieu thereof "(b)(3)(B)", and in Note 9(c) by deleting "or risked".

The Commentary to § 2F1.1 captioned "Background" is amended in the third paragraph by deleting "not only", by deleting ", but also specifies that the minimum offense level in such cases shall be 10", and by deleting the last sentence.

The Commentary to § 2F1.1 captioned "Application Notes" is amended by deleting Note 10 in its entirety, and by renumbering Notes 11-14 as 10-13 respectively.

Reason for Amendment: This amendment is derived from the instruction to the Commission in Section 2(b) of the Major Fraud Act of 1988. The Commission has concluded that a 2-level enhancement with a minimum offense level of 13 should apply to all fraud cases involving a conscious or reckless risk of serious bodily injury. In addition, the amendment divides former subsection (b)(2) into two separate specific offenses characteristics to better reflect their separate nature.

§ 2G1.1 *Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct*

91. **Amendment:** Section 2G1.1(b)(1) is amended by deleting "defendant used" and inserting in lieu thereof "offense involved the use of", and by deleting "drugs or otherwise" and inserting in lieu thereof "threats or drugs or in any manner".

The Commentary to § 2G1.1 captioned "Application Notes" is amended in Note 2 by deleting "by drugs or otherwise" immediately following "coercion".

Reason for Amendment: The purpose of this amendment is to clarify the guideline and Commentary.

92. **Amendment:** Section 2G1.1 is amended by inserting the following additional subsection:

"(c) Special Instruction

(1) If the offense involves the transportation of more than one person, Chapter Three, Part D (Multiple Counts) shall be applied as if the transportation of each

person had been contained in a separate count of conviction."

Reason for Amendment: The purpose of this amendment is to provide a special instruction for the application of the multiple count rule in cases involving the transportation of more than one person.

§ 2G1.2 *Transportation of a Minor for the Purpose of Prostitution or Prohibited Sexual Conduct*

93. **Amendment:** Section 2G1.2(b)(1) is amended by deleting "drugs or otherwise" and inserting in lieu thereof "threats or drugs or in any manner".

Section 2G2.1(b) (2) and (3) is amended by deleting "conduct" whenever it appears and inserting in lieu thereof in each instance "offense".

The Commentary to § 2G1.2 captioned "Application Notes" is amended in Note 2 by deleting "by drugs or otherwise" immediately following "coercion", and in the caption by deleting "Note" and inserting in lieu thereof "Notes".

Reason for Amendment: The purpose of this amendment is to clarify the guideline and Commentary.

94. **Amendment:** Section 2G1.2 is amended by inserting the following additional subsection:

"(c) Special Instruction

(1) If the offense involves the transportation of more than one person, Chapter Three, Part D (Multiple Counts) shall be applied as if the transportation of each person had been contained in a separate count of conviction."

Reason for Amendment: The purpose of this amendment is to provide a special instruction for the application of the multiple count rule in cases involving the transportation of more than one person.

§ 2G2.1 *Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material*

95. **Amendment:** The Commentary to § 2G2.1 captioned "Application Note" is amended in Note 1 by deleting ", distinct offense, even if several are exploited simultaneously" and inserting in lieu thereof "victim. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under § 3D1.2 (Groups of Closely-Related Counts)".

Reason for Amendment: The purpose of this amendment is to clarify that multiple counts involving different minors are not grouped under § 3D1.2.

§ 2G2.3 *Selling or Buying of Children for Use in the Production of Pornography*

96. **Amendment:** Chapter Two, Part G, is amended by inserting as an additional guideline:

"§ 2G2.3 Selling or Buying of Children for Use in the Production of Pornography

(a) Base Offense Level: 38

Commentary

Statutory Provision: 18 U.S.C. 2251A

Background: The statutory minimum sentence for a defendant convicted under 18 U.S.C. 2251A is twenty years imprisonment."

Reason for Amendment: The purpose of this amendment is to create a guideline covering the new offense in Section 7512 of the Anti-Drug Abuse Act of 1988.

§ 2G3.1 *Importing, Mailing, or Transporting Obscene Matter*

97. **Amendment:** The Commentary to § 2G3.1 captioned "Statutory Provisions" is amended by deleting "§§ 1461-1465" and inserting in lieu thereof "§§ 1460-1463, 1465-1466".

Reason for Amendment: The purpose of this amendment is to conform the Statutory Provisions to the revision of § 2G3.2 and to make them more comprehensive.

§ 2G3.2 *Obscene or Indecent Telephone Communications*

98. **Amendment:** Section 2G3.2 and the Commentary thereto are amended by deleting the entire text thereof, including the title, as follows:

"§ 2G3.2 Obscene or Indecent Telephone Communications

(a) Base Offense Level: 6

Commentary

Statutory Provision: 47 U.S.C. 223.

Background: This offense is a misdemeanor for which the maximum term of imprisonment authorized by statute is six months."

and inserting in lieu thereof:

"§ 2G3.2 Obscene Telephone Communications for a Commercial Purpose; Broadcasting Obscene Material

(a) Base Offense Level: 12

(b) Specific Offense Characteristics

(1) If a person who received the telephonic communication was less than eighteen years of age, or if a broadcast was made between six o'clock in the morning and eleven o'clock at night, increase by 4 levels.

(2) If 6 plus the offense level from the table at 2F1.1(b)(1) corresponding to the volume of commerce attributable to the defendant is greater than the offense level determined above, increase to that offense level.

Commentary

Statutory Provisions: 18 U.S.C. 1464, 1468; 47 U.S.C. 223(b)(1)(A).

Background: Subsection (b)(1) provides an enhancement where an obscene telephonic communication was received by a minor less than 18 years of age or where a broadcast was made during a time when such minors were likely to receive it. Subsection (b)(2) provides an enhancement for large-scale "dial-a-porn" or obscene broadcasting operations that results in an offense level comparable to the offense level for such operations under 2G3.1 (Importing, Mailing, or Transporting Obscene Matter). The extent to which the obscene material was distributed is approximated by the volume of commerce attributable to the defendant."

Reason for Amendment: The purposes of this amendment are to delete a petty offense no longer covered by the guidelines, and to insert a guideline covering felony offenses, including two offenses created by Sections 7523 and 7524 of the Anti-Drug Abuse Act of 1988.

§ 2H1.3 Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination

99. Amendment: The title to § 2H1.3 is amended by adding at the end "Damage to Religious Real Property".

The Commentary to § 2H1.3 captioned "Statutory Provisions" is amended by deleting "18 U.S.C. 245" and inserting in lieu thereof "18 U.S.C. 245, 247".

Reason for Amendment: The purpose of this amendment is to include a recently enacted offense (18 U.S.C. 247) expressly in the title of this guideline.

§ 2H1.4 Interference with Civil Rights Under Color of Law

100. Amendment: Section 2H1.4(a)(2) is amended by deleting "2 plus" and inserting in lieu thereof "6 plus".

The Commentary to § 2H1.4 captioned "Application Notes" is amended in Note 1 by deleting "2 plus" and inserting in lieu thereof "6 plus", and by deleting "is defined" and inserting in lieu thereof "means 6 levels above the offense level for any underlying criminal conduct. See the discussion".

The Commentary to § 2H1.4 captioned "Background" is amended by deleting "except where death results, in which case the maximum term of imprisonment authorized is life imprisonment" and inserting in lieu thereof "if no bodily injury results, ten years if bodily injury results, and life imprisonment if death results", by deleting "Given this one-year statutory maximum, a" and inserting in lieu thereof "A", by inserting "one year" immediately following "near the", and by inserting "or bodily injury" immediately following "resulting in death".

The Commentary to § 2H1.4 captioned "Background" is amended by inserting at the end of the first paragraph:

"The 6-level increase under subsection (a)(2) reflects the 2-level increase that is applied to other offenses covered in this Part plus a 4-level increase for the commission of the offense under actual or purported legal authority. This 4-level increase is inherent in the base offense level of 10 under subsection (a)(1)."

Reason for Amendment: This amendment corrects an anomaly between the offense level under this section and § 2H1.5 when the offense level is determined under subsection (a)(2). Section 2H1.4 is similar to § 2H1.5 in that it may or may not involve the use of force. Under § 2H1.4, however, the offense must involve the abuse of actual or purported legal authority. The base offense level of 10 used in 2H1.4(a)(1) has a built-in 4-level enhancement (which corresponds to the base offense level of 6 under § 2H1.5(a)(1) plus the 4-level increase for a public official). There is an anomaly, however, when the base offense level from (a)(2) is used. In such cases, § 2H1.4 results in an offense level that is 4 levels less than § 2H1.5 when the offense is committed by a public official. The Commentary to § 2H1.4 is also amended to reflect the increase in the maximum authorized sentence from one to ten years in cases involving bodily injury.

§ 2H1.5 Other Deprivations of Rights or Benefits in Furtherance of Discrimination

101. Amendment: The Commentary to § 2H1.5 captioned "Application Notes" is amended in Note 2 by deleting "§ 2H1.4(b)(1)" and inserting in lieu thereof "§ 2H1.5(b)(1)".

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

§ 2H2.1 Obstructing an Election or Registration

102. Amendment: Section 2H2.1(a)(1) is amended by deleting "persons" and inserting in lieu thereof "person(s)".

The Commentary to § 2H2.1 captioned "Background" is amended by deleting "Specific offense characteristics" and inserting in lieu thereof "Alternative base offense levels".

Reason for Amendment: The purpose of this amendment is to correct two clerical errors. First, the use of the plural "persons" in current subsection (a) (1) could be read to mean this subsection does not apply if the force or threat was applied only to one person, a result that was not intended. Second, the reference to "Specific offense characteristics" in the current Background is inaccurate; it should read "Alternative base offense levels".

§ 2H3.1 Interception of Communications or Eavesdropping

103. Amendment: Section 2H3.1 is amended by deleting:

"(a) Base Offense Level (Apply the greater):

(1) 9; or

(2) If the purpose of the conduct was to facilitate another offense, apply the guideline applicable to an attempt to commit that offense.

(b) Specific Offense Characteristic

(1) If the purpose of the conduct was to obtain direct or indirect commercial advantage or economic gain not covered by § 2H3.1(a)(2) above, increase by 3 levels."

and inserting in lieu thereof:

"(a) Base Offense Level: 9

(b) Specific Offense Characteristic

(1) If the purpose of the conduct was to obtain direct or indirect commercial advantage or economic gain, increase by 3 levels.

(c) Cross Reference

(1) If the purpose of the conduct was to facilitate another offense, apply the guideline applicable to an attempt to commit that offense, if the resulting offense level is greater than that determined above."

Reason for Amendment: This amendment corrects an anomaly in § 2H3.1. Currently, specific offense characteristic (b)(1) applies only to base offense level (a)(1). Consequently, conduct facilitating an offense for economic gain of level 8 or 9 would result in a greater offense level (11 or 12) than conduct facilitating a more serious (level 10 or 11) offense.

§ 2J1.1 Contempt

104. Amendment: Section 2J1.1 is amended by deleting:

"If the defendant was adjudged guilty of contempt, the court shall impose a sentence based on stated reasons and the purposes of sentencing set forth in 18 U.S.C. 3553(a)(2)."

and inserting in lieu thereof:

"Apply § 2X5.1 (Other Offenses)."

The Commentary to § 2J1.1 captioned "Application Note" is amended in Note 1 by deleting "See, however, § 2X5.1 (Other Offenses)." and inserting in lieu thereof "In certain cases, the offense conduct will be sufficiently analogous to § 2J1.2 (Obstruction of Justice) for that guideline to apply."

Reason for Amendment: This section is designated as a guideline, but it is not a guideline contemplated by the Sentencing Reform Act. This amendment clarifies the Commission's original intent by referencing this section to § 2X5.1 (Other Offenses).

105. Amendment: The Commentary to § 2J1.1 captioned "Statutory Provisions" is amended by deleting "Provisions" and

inserting in lieu thereof "Provision", and by deleting "§" and ", 402".

Reason for Amendment: The purpose of this amendment is to delete a reference to a petty offense.

§ 2J1.2 Obstruction of Justice

106. *Amendment:* Section 2J1.2(b)(1) is amended by deleting "defendant obstructed or attempted to obstruct the administration of justice by" and inserting in lieu thereof "offense involved", and by deleting "or property," and inserting in lieu thereof "or property damage, in order to obstruct the administration of justice".

Section 2J1.2(b)(2) is amended by deleting "defendant substantially interfered" and inserting in lieu thereof "offense resulted in substantial interference".

Section 2J1.2(c)(1) is amended by deleting "conduct was" and inserting in lieu thereof "offense involved", and by deleting "such" and inserting in lieu thereof "that".

The Commentary to § 2J1.2 captioned "Application Notes" is amended in Note 1 by deleting "Substantially interfered" and inserting in lieu thereof "Substantial interference", and by deleting "offense conduct resulting in".

Reason for Amendment: The purposes of this amendment are to clarify the guideline and to ensure that an attempted obstruction is not excluded from subsection (c) because of the non-parallel language between (b)(1) and (c)(1).

107. *Amendment:* The Commentary to § 2J1.2 captioned "Statutory Provisions" is amended by deleting "1503-" and inserting in lieu thereof "1503, 1505-".

Reason for Amendment: The purpose of this amendment is to delete a reference to a petty offense.

108. *Amendment:* The Commentary to § 2J1.2 captioned "Statutory Provisions" is amended by inserting "1516" immediately following "1513".

Reason for Amendment: The purpose of this amendment is to expand the coverage of an existing guideline to include a new offense (Obstruction of a Federal Audit) created by Section 7078 of the Anti-Drug Abuse Act of 1988.

§ 2J1.3 Perjury

109. *Amendment:* Section 2J1.3 is amended in the caption by inserting "or Subornation of Perjury" immediately following "Perjury".

Section 2J1.3(b)(1) is amended by deleting "defendant suborned perjury by" and inserting in lieu thereof "offense involved", and by deleting "or property" and inserting in lieu thereof "or property damage, in order to suborn perjury".

Section 2J1.3(b)(2) is amended by deleting "defendant's", and by deleting "substantially interfered" and inserting in lieu thereof "resulted in substantial interference".

Section 2J1.3(c)(1) is amended by deleting "conduct was perjury" and inserting in lieu thereof "offense involved perjury or subornation of perjury", and by deleting "such" and inserting in lieu thereof "that".

The Commentary to § 2J1.3 captioned "Application Notes" is amended in Note 1 by deleting "Substantially interfered" and inserting in lieu thereof "Substantial interference", and by deleting "offense conduct resulting in".

Reason for Amendment: The purposes of this amendment are to clarify the guideline and to ensure that subornation of perjury is not excluded from subsection (c) due to a lack of parallel wording in the subsections.

§ 2J1.4 Impersonation

110. *Amendment:* Section 2J1.4(b)(1) is amended by deleting:

"If the defendant falsely represented himself as a federal officer, agent or employee to demand or obtain any money, paper, document, or other thing of value or to conduct an unlawful arrest or search, increase by 6 levels.",

and inserting in lieu thereof:

"If the impersonation was committed for the purpose of conducting an unlawful arrest, detention, or search, increase by 6 levels."

Section 2J1.4 is amended by inserting the following additional subsection:

"(c) Cross Reference

(1) If the impersonation was to facilitate another offense, apply the guideline for an attempt to commit that offense, if the resulting offense level is greater than the offense level determined above."

Reason for Amendment: The purpose of this amendment is to relate the offense levels more directly to the underlying offense where the impersonation is committed for the purpose of facilitating another offense.

§ 2J1.5 Failure to Appear by Material Witness

111. *Amendment:* Section 2J1.5(b)(1) is amended by deleting "substantially interfered" and inserting in lieu thereof "resulted in substantial interference".

The Commentary to § 2J1.5 captioned "Application Notes" is amended in Note 1 by deleting "Substantially interfered" and inserting in lieu thereof "Substantial interference", and by deleting "offense conduct resulting in".

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

§ 2J1.7 Commission of Offense While on Release

112. *Amendment:* Section 2J1.7 is amended by deleting:

"§ 2J1.7. Commission of Offense While on Release

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the offense committed while on release is punishable by death or imprisonment for a term of fifteen years or more, increase by 6 levels.

(2) If the offense committed while on release is punishable by a term of imprisonment of five or more years, but less than fifteen years, increase by 4 levels.

(3) If the offense committed while on release is a felony punishable by a maximum term of less than five years, increase by 2 levels.

Commentary

Statutory Provision: 18 U.S.C. 3147.

Application Notes:

1. This guideline applies whenever a sentence pursuant to 18 U.S.C. 3147 is imposed.

2. By statute, a term of imprisonment imposed for a violation of 18 U.S.C. 3147 runs consecutively to any other term of imprisonment. Consequently, a sentence for such a violation is exempt from grouping under the multiple count rules. See § 3D1.2.

Background: Because defendants convicted under this section will generally have a prior criminal history, the guideline sentences provided are greater than they otherwise might appear."

and inserting in lieu thereof:

"§ 2J1.7. Commission of Offense While on Release

If an enhancement under 18 U.S.C. 3147 applies, add 3 levels to the offense level for the offense committed while on release as if this section were a specific offense characteristic contained in the offense guideline for the offense committed while on release.

Commentary

Statutory Provision: 18 U.S.C. 3147.

Application Notes:

1. Because 18 U.S.C. 3147 is an enhancement provision, rather than an offense, this section provides a specific offense characteristic to increase the offense level for the offense committed while on release.

2. Under 18 U.S.C. 3147, a sentence of imprisonment must be imposed in addition to the sentence for the underlying offense, and the sentence of imprisonment imposed under 18 U.S.C. 3147 must run consecutively to any other sentence of imprisonment. Therefore, the court, in order to comply with the statute, should divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement. The court will have to ensure that the 'total punishment'

(i.e., the sentence for the offense committed while on release plus the sentence enhancement under 18 U.S.C. 3147) is in accord with the guideline range for the offense committed while on release, as adjusted by the enhancement in this section. For example, if the applicable adjusted guideline range is 30-37 months and the court determines 'total punishment' of 36 months is appropriate, a sentence of 30 months for the underlying offense plus 6 months under 18 U.S.C. 3147 would satisfy this requirement.

Background: An enhancement under 18 U.S.C. 3147 may be imposed only upon application of the government; it cannot be imposed on the court's own motion. In this respect, it is similar to a separate count of conviction and, for this reason, is placed in Chapter Two of the guidelines.

Legislative history indicates that the mandatory nature of the penalties required by 18 U.S.C. 3147 was to be eliminated upon the implementation of the sentencing guidelines. 'Section 213(h) (renumbered as section 200(g) in the Crime Control Act of 1984) amends the new provision in title I of this Act relating to consecutive enhanced penalties for committing an offense on release (new 18 U.S.C. 3147) by eliminating the mandatory nature of the penalties in favor of utilizing sentencing guidelines.' (Senate Report 98-225 at 186). Not all of the phraseology relating to the requirement of a mandatory sentence, however, was actually deleted from the statute. Consequently, it appears that the court is required to impose a consecutive sentence of imprisonment under this provision, but there is no requirement as to any minimum term. This guideline is drafted to enable the court to determine and implement a combined 'total punishment' consistent with the overall structure of the guidelines, while at the same time complying with the statutory requirement. Guideline provisions that prohibit the grouping of counts of conviction requiring consecutive sentences (e.g., the introductory paragraph of § 3D1.2; § 5G1.2(a)) do not apply to this section because 18 U.S.C. 3147 is an enhancement, not a count of conviction."

Reason for Amendment: The purpose of this amendment is to reflect the fact that 18 U.S.C. 3147 is an enhancement provision, not a distinct offense. Created in 1984 as part of the Comprehensive Crime Control Act, the statute contained interim provisions (mandatory consecutive sentences that were subject to the parole and good time provisions of prior law) that were to be in effect until the sentencing guidelines took effect. The Senate Report to S. 1762 indicates that the mandatory nature of the interim provisions was to be eliminated when the sentencing guidelines took effect ("Section 213(h) (220(g) of the CCCA of 1984) amends the new provision in title I of this Act relating to consecutive enhanced penalties for committing an offense while on release (new 18 U.S.C. 3147)) by eliminating the mandatory nature of the penalties in favor of utilizing

sentencing guidelines" (Senate Report 98-225 at 186). The statute, as amended, however, did not actually eliminate all language referring to mandatory penalties. A mandatory consecutive term of imprisonment is required but, unlike other mandatory provisions, there is no minimum required.

The amendment converts this section into an offense level adjustment for the offense committed while on release, a treatment that is considerably more consistent with the treatment of other offense/offender characteristics.

§ 2J1.8 Bribery of a Witness

113. Amendment: Section 2J1.8(b)(1) is amended by deleting "substantially interfered" and inserting in lieu thereof "resulted in substantial interference".

Section 2J1.8(c)(1) is amended by deleting "conduct was" and inserting in lieu thereof "offense involved", and by deleting "such" and inserting in lieu thereof "that".

The Commentary to § 2J1.8 captioned "Application Notes" is amended in Note 1 by deleting "Substantially interfered" and inserting in lieu thereof "Substantial interference", and by deleting "offense conduct resulting in".

The Commentary to § 2J1.8 captioned "Application Notes" is amended in Note 2 by deleting "This section applies only in the case of a conviction under the above referenced (or equivalent) statute." immediately before "For offenses".

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

§ 2J1.9 Payment to Witness

114. Amendment: The Commentary to § 2J1.9 captioned "Application Notes" is amended in Note 2 by deleting "This section applies only in the case of a conviction under the above referenced (or equivalent) statute." immediately before "For offenses".

Reason for Amendment: The purpose of this amendment is to clarify the Commentary.

115. Amendment: Section 2J1.9(b)(1) is amended by deleting "for refusing to testify" and inserting in lieu thereof "made or offered for refusing to testify or for the witness absenting himself to avoid testifying".

The Commentary to § 2J1.9 captioned "Application Notes" is amended by deleting:

"1. 'Refusing to testify' includes absenting oneself for the purpose of avoiding testifying."

and by renumbering Notes 2 and 3 as 1 and 2 respectively.

Reason for Amendment: The purpose of this amendment is to move material

from the Commentary to the guideline itself where it more properly belongs.

Chapter Two, Part K, Offenses Involving Public Safety

116. Amendment: Sections 2K1.4(c) and 2K1.5(c) are amended by deleting "higher" whenever it appears and inserting in lieu thereof "greater".

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

§ 2K1.3 Unlawfully Trafficking In, Receiving, or Transporting Explosives

117. Amendment: Section 2K1.3(b) is amended by deleting "any of the following" and inserting in lieu thereof "more than one".

Section 2K1.3(b)(5) is amended by deleting "firearm offense" and inserting in lieu thereof "offense involving explosives".

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

§ 2K1.4 Arson: Property Damage By Use of Explosives

118. Amendment: Section 2K1.4(b) is amended by deleting "any of the following" and inserting in lieu thereof "more than one".

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

119. Amendment: Section 2K1.4 is amended by inserting the following as an additional subsection:

"(d) Note:

(1) The specific offense characteristic in subsection (b)(4) applies only in the case of an offense committed prior to November 18, 1988."

The Commentary to § 2K1.4 captioned "Statutory Provisions" is amended by inserting "(only in the case of an offense committed prior to November 18, 1988)" immediately following "(h)".

The Commentary to § 2K1.4 captioned "Background", is amended by deleting "used fire or an explosive in the commission of a felony," and by inserting at the end of the paragraph the following new sentence: "As amended by Section 6474(b) of the Anti-Drug Abuse Act of 1988 (effective November 18, 1988), 18 U.S.C. 844(h) sets forth a mandatory sentencing enhancement of five years for the first offense and ten years for subsequent offenses if the defendant was convicted of using fire or an explosive to commit a felony or of carrying an explosive during the commission of a felony. See § 2K1.7."

Reason for Amendment: The purpose of this amendment is to conform the

guideline to a statutory revision to 18 U.S.C. 844(h).

§ 2K1.5 Possessing Dangerous Weapons or Materials While Boarding or Aboard an Aircraft

120. Amendment: Section 2K1.5(b) is amended by deleting "any of the following" and inserting in lieu thereof "more than one".

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

121. Amendment: Section 2K1.5(b)(1) is amended by deleting "[i.e., the defendant is convicted under 49 U.S.C. 1472(l)(2)]", and by inserting "is convicted under 49 U.S.C. 1472(l)(2) (i.e., the defendant" immediately before "acted".

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

§ 2K1.7 Use of Fire or Explosive to Commit a Federal Felony

122. Amendment: Chapter Two, Part K is amended by inserting as an additional guideline the following:

"§ 2K1.7. Use of Fire or Explosive to Commit a Federal Felony

If the defendant, whether or not convicted of another crime, was convicted under 18 U.S.C. 844(h), the term of imprisonment is that required by statute.

Commentary

Statutory Provision: 18 U.S.C. 844(h).

Application Notes:

1. The statute requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.

2. Imposition of a term of supervised release is governed by the provisions of § 5D1.1 (Imposition of a Term of Supervised Release)."

Reason for Amendment: The purpose of this amendment is to conform the guideline to a statutory revision of the meaning of 18 U.S.C. 844(h).

Chapter Two Part K, Subpart 2

123. Amendment: Section 2K2.1 and accompanying Commentary, except for Commentary captioned "Background", are deleted and the following inserted in lieu thereof:

"§ 2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition

(a) Base Offense Level (Apply the greatest): (1) 16, if the defendant is convicted under 18 U.S.C. 922(o) or 26 U.S.C. 5861; or

(2) 12, if the defendant is convicted under 18 U.S.C. 922(g), (h), or (n); or if the defendant, at the time of the offense, had been convicted in any court of an offense punishable by imprisonment for a term exceeding one year; or

(3) 6, otherwise.

(b) Specific Offense Characteristics

(1) If the defendant obtained or possessed the firearm or ammunition solely for lawful sporting purposes or collection, decrease the offense level determined above to level 6.

(2) If the firearm was stolen or had an altered or obliterated serial number, increase by 2 levels.

(c) Cross References

(1) If the offense involved the distribution of a firearm or possession with intent to distribute, apply § 2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving a Firearm) if the resulting offense level is greater than that determined above.

(2) If the defendant used or possessed the firearm in connection with commission or attempted commission of another offense, apply § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above.

Statutory Provisions: 18 U.S.C. 922(a)(1), (a)(3), (a)(4), (a)(6), (e), (f), (g), (h), (i), (j), (k), (l), (n), and (o); 26 U.S.C. 5861(b), (c), (d), (h), (i), (j), and (k).

Application Notes:

1. The definition of 'firearm' used in this section is that set forth in 18 U.S.C. 921(a)(3) (if the defendant is convicted under 18 U.S.C. 922) and 26 U.S.C. 5845(a) (if the defendant is convicted under 26 U.S.C. 5861). These definitions are somewhat broader than that used in Application Note 1(e) of the Commentary to § 1B1.1 (Application Instructions). Under 18 U.S.C. 921(a)(3), the term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Under 26 U.S.C. 5845(a), the term 'firearm' includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or weapon from a rifle, with a barrel or barrels less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain other large bore weapons.

2. Under § 2K2.1(b)(1), intended lawful use, as determined by the surrounding circumstances, provides a decrease in offense level. Relevant circumstances include, among others, the number and type of firearms (sawed-off shotguns, for example, have few legitimate uses) and ammunition, the location and circumstances of possession, the nature of the defendant's criminal history (e.g., whether involving firearms), and the extent to which possession was restricted by local law."

Sections 2K2.2 and 2K2.3, including titles and accompanying Commentary, are deleted in their entirety and the following substituted in lieu thereof:

"§ 2K2.2. Unlawful Trafficking and Other Prohibited Transactions Involving Firearms

(a) Base Offense Level:

(1) 16, if the defendant is convicted under 18 U.S.C. 922(o) or 26 U.S.C. 5861; (2) 6, otherwise.

(b) Specific Offense Characteristics

(1) If the offense involved distribution of a firearm, or possession with intent to distribute, and the number of firearms unlawfully distributed, or to be distributed, exceeded two, increase as follows:

Number of firearms	Increase in level
(A) 3-4	Add 1.
(B) 5-7	Add 2.
(C) 8-12	Add 3.
(D) 13-24	Add 4.
(E) 25-49	Add 5.
(F) 50 or more	Add 6.

(2) If any of the firearms was stolen or had an altered or obliterated serial number, increase by 2 levels.

(3) If more than one of the following applies, use the greater:

(A) If the defendant is convicted under 18 U.S.C. 922(d), increase by 6 levels; or

(B) If the defendant is convicted under 18 U.S.C. 922 (b)(1) or (b)(2), increase by 1 level.

(c) Cross Reference

(1) If the defendant, at the time of the offense, had been convicted in any court of a crime punishable by imprisonment for a term exceeding one year, apply § 2K2.1 (Unlawful Possession, Receipt, or Transportation of a Firearm or Ammunition) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. 922 (a)(1), (a)(2), (a)(5), (b), (c), (d), (e), (f), (i), (j), (k), (l), (m), (o); 26 U.S.C. 5861 (a), (e), (f), (g), (j), and (l).

Application Note

1. The definition of firearm used in this section is that set forth in 18 U.S.C. 921(a)(3) (if the defendant is convicted under 18 U.S.C. 922) and 26 U.S.C. 5845(a) (if the defendant is convicted under 26 U.S.C. 5861). These definitions are somewhat broader than that used in Application Note 1(e) of the Commentary to § 1B1.1 (Application Instructions). Under 18 U.S.C. 921(a)(3), the term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Under 26 U.S.C. 5845(a), the term 'firearm' includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or weapon from a rifle, with a barrel or barrels less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain other large bore weapons.

2. If the number of weapons involved exceeded fifty, an upward departure may be warranted. An upward departure especially may be warranted in the case of large numbers of military type weapons (e.g., machine guns, automatic weapons, assault rifles).

Background: This guideline applies to a variety of offenses involving firearms, ranging from unlawful distribution of silencers, machine guns, sawed-off shotguns and destructive devices, to essentially technical violations."

"§ 2K2.3. *Receiving, Transporting, Shipping or Transferring a Firearm or Ammunition With Intent to Commit Another Offense, or With Knowledge that It Will Be Used in Committing Another Offense*

(a) Base Offense Level (Apply the greatest):

(1) The offense level from § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the offense that the defendant intended or knew was to be committed with the firearm; or

(2) The offense level from § 2K2.1 (Unlawful Receipt, Possession, or Transportation of a Firearm), or § 2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving a Firearm), as applicable; or

(3) 12.

Commentary

Statutory Provisions: 18 U.S.C. 924 (b), (f), (g)."

Reason for Amendment: This amendment addresses a number of diverse substantive and technical issues, as well as the creation of several new offenses, and increased statutory maximum penalties for certain other offenses. Because there exist a large number of overlapping statutory provisions, the three basic guidelines, § 2K2.1 (Possession by a prohibited person), § 2K2.2 (Possession of certain types of weapons), and § 2K2.3 (Unlawful trafficking) are not closely tied to the actual conduct. The amendment addresses this issue by consolidating the current three guidelines into two guidelines: (1) unlawful possession, receipt, or transportation, and (2) unlawful trafficking; and by more carefully drawing the distinctions between the base offense levels provided. The third guideline in this amendment is a new guideline to address transfer of a weapon with intent or knowledge that it will be used to commit another offense (formerly covered in a cross reference) and a new offense added by the Anti-Drug Abuse Act of 1988 (Section 6211) (Interstate travel to acquire a firearm for a criminal purpose).

The base offense level for conduct covered by the current § 2K2.1 is increased in the amendment from 9 to 12. The statutorily authorized maximum sentence for the conduct covered under § 2K2.1 was increased from five to ten

years by the Anti-Drug Abuse Act of 1988 (Section 6462). Note, however, that the most aggravated conduct under § 2K2.1 (possession of a weapon during commission of another offense) is handled by the cross-reference at subsection (c) and is based upon the offense level for an attempt to commit the underlying offense. See Background Commentary to current § 2K2.1. The offense level for unlawful possession of a machine gun, sawed off shotgun, or destructive device is increased from 12 to 16. In addition, the amendment raises the enhancement for stolen weapons or obliterated serial numbers from 1 to 2 levels to better reflect the seriousness of this conduct. The numbers currently used in the table for the distribution of multiple weapons in § 2K2.2 are amended to increase the offense level more rapidly for sale of multiple weapons.

§ 2K2.4 Use of Firearms or Armor-Piercing Ammunition During or in Relation to Certain Crimes

124. Amendment: Section 2K2.4 is amended by deleting "penalties are those" and inserting in lieu thereof "term of imprisonment is that".

The Commentary to § 2K2.4 captioned "Application Notes" is amended by inserting the following additional Note:

"3. Imposition of a term of supervised release is governed by the provisions of § 5D1.1 (Imposition of a Term of Supervised Release)."

Section 2K2.4 is amended by inserting "(a)" immediately before "If", and by inserting as an additional subsection the following:

"(b) Special Instructions for Fines:

(1) Where there is a federal conviction for the underlying offense, the fine guideline shall be the fine guideline that would have been applicable had there only been a conviction for the underlying offense. This guideline shall be used as a consolidated fine guideline for both the underlying offense and the conviction underlying this section."

The Commentary to § 2K2.4 captioned "Application Notes" is amended by inserting the following as an additional Note:

"4. Subsection (b) sets forth special provisions concerning the imposition of fines. Where there is also a conviction for the underlying offense, a consolidated fine guideline is determined by the offense level that would have applied to the underlying offense absent a conviction under 18 U.S.C. 924(c) or 929(a). This is because the offense level for the underlying offense may be reduced when there is also a conviction under 18 U.S.C. 924(c) or 929(a) in that any specific offense characteristic for possession, use, or discharge of a firearm is not applied (see Application Note 2). The Commission

has not established a fine guideline range for the unusual case in which there is no conviction for the underlying offense."

Reason for Amendment: The purpose of this amendment is to address the imposition of a fine or term of supervised release when this guideline applies.

§ 2K2.5 Possession of Firearms and Dangerous Weapons in Federal Facilities

125. Amendment: Chapter Two, Part K is amended by adding the following new guideline and accompanying commentary:

"§ 2K2.5 Possession of Firearms and Dangerous Weapons in Federal Facilities

(a) Base Offense Level: 6

(b) Cross Reference

(1) If the defendant possessed the firearm or other dangerous weapon with intent to use it in the commission of another offense, apply § 2X1.1 (Attempt, Solicitation or Conspiracy) in respect to that other offense if the resulting offense level is greater than that determined above.

Commentary

Statutory Provision: 18 U.S.C. 930."

Reason for Amendment: This amendment adds a guideline to cover a new offense enacted by Section 6215 of the Anti-Drug Abuse Act of 1988.

A base offense level of 6 is provided for the misdemeanor portion of this statute. The felony portion of this statute (possession with intent to commit another offense) is treated as if an attempt to commit that other offense.

§ 2L1.1 Smuggling, Transporting, or Harboring an Unlawful Alien

126. Amendment: Section 2L1.1(b) is amended by inserting as a new subsection the following:

"(3) If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, and the offense level determined above is less than level 8, increase to level 8."

The Commentary to § 2L1.1 captioned "Application Notes" is amended in Note 6 by deleting "enhancement at § 2L1.1(b)(1) does not apply" and inserting in lieu thereof "reduction at § 2L1.1(b)(1) applies".

Reason for Amendment: The purposes of this amendment are to provide an offense level that is no less than that provided under § 2L1.2 in the case of a defendant who is a previously deported alien, and to conform Application Note 6 of the Commentary to § 2L1.1 to the January 1988 revision of § 2L1.1.

§ 2L1.2 Unlawfully Entering or Remaining in the United States

127. *Amendment:* Section 2L1.2 is amended by inserting the following as a specific offense characteristic:

"(b) Specific Offense Characteristic

(1) If the defendant previously was deported after sustaining a conviction for a felony, other than a felony involving violation of the immigration laws, increase by 4 levels."

The Commentary to § 2L1.2 captioned "Application Notes" is amended by adding the following additional Notes:

"3. A 4-level increase is provided under subsection (b)(1) in the case of a defendant who was previously deported after sustaining a conviction for a felony, other than a felony involving a violation of the immigration laws. In the case of a defendant previously deported after sustaining a conviction for an aggravated felony as defined in 8 U.S.C. 1101(a), or for any other violent felony, an upward departure may be warranted.

4. The adjustment under § 2L1.2(b)(1) is in addition to any criminal history points added for such conviction in Chapter 4, Part A (Criminal History)."

Reason for Amendment: The purpose of this amendment is to add a specific offense characteristic to provide an increase in the case of an alien previously deported after conviction of a felony other than an immigration law violation. This specific offense characteristic is in addition to, and not in lieu of, criminal history points added for the prior sentence. The amendment provides for consideration of an upward departure where the previous deportation was for an "aggravated felony" or for any other violent felony.

§ 2L1.3 Engaging in a Pattern of Unlawful Employment of Aliens

128. *Amendment:* Section 2L1.3 and the Commentary thereto are amended by deleting the entire text thereof, including the title, as follows:

"§ 2L1.3. Engaging in a Pattern of Unlawful Employment of Aliens

(a) Base Offense Level: 6

Commentary

Statutory Provision: 8 U.S.C. 1324a(f)(1).

Background: The offense covered under this section is a misdemeanor for which the maximum term of imprisonment authorized by statute is six months."

Reason for Amendment: The purpose of this amendment is to delete a guideline applying only to a petty offense. Petty offenses were deleted from coverage of the guidelines by the adoption of § 1B1.9 (effective June 15, 1988).

§ 2L2.1 Trafficking in Evidence of Citizenship or Documents Authorizing Entry

129. *Amendment:* Section 2L2.1(a) is amended by deleting "6" and inserting in lieu thereof "9".

Section 2L2.1(b)(1) is amended by deleting "for profit, increase by 3 levels" and inserting in lieu thereof "other than for profit, decrease by 3 levels".

Reason for Amendment: The purpose of this amendment is to conform the structure of this guideline to that of § 2L1.1.

§ 2L2.2 Fraudulently Acquiring Evidence of Citizenship or Documents Authorizing Entry for Own Use

130. *Amendment:* Section 2L2.2 is amended by inserting as a new subsection the following:

"(b) Specific Offense Characteristic

(1) If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, increase by 2 levels."

The Commentary to § 2L2.2 captioned "Application Notes" is amended by deleting:

"1. In the case of a defendant who is an unlawful alien and has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, the Commission recommends an upward departure of 2 levels in order to provide a result equivalent to § 2L1.2."

by renumbering Note 2 as Note 1, and by deleting "Notes" and inserting in lieu thereof "Note".

Reason for Amendment: The purpose of this amendment is to convert a departure recommendation into a specific offense characteristic.

§ 2L2.3 (Trafficking in a United States Passport

131. *Amendment:* Section 2L2.3(a) is amended by deleting "6" and inserting in lieu thereof "9".

Section 2L2.3(b)(1) is amended by deleting "for profit, increase by 3 levels" and inserting in lieu thereof "other than for profit, decrease by 3 levels".

Reason for Amendment: The purpose of this amendment is to conform the structure of this guideline to that of § 2L1.1.

§ 2L2.4 Fraudulently Acquiring or Improperly Using a United States Passport

132. *Amendment:* Section 2L2.4 is amended by inserting as a new subsection the following:

"(b) Specific Offense Characteristic

(1) If the defendant is an unlawful alien who has been deported (voluntarily or

involuntarily) on one or more occasions prior to the instant offense, increase by 2 levels."

The Commentary to § 2L2.4 captioned "Application Notes" is amended by deleting:

"1. In the case of a defendant who is an unlawful alien and has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, the Commission recommends an upward departure of 2 levels in order to provide a result equivalent to § 2L1.2."

by renumbering Note 2 as Note 1, and by deleting "Notes" and inserting in lieu thereof "Note".

Reason for Amendment: The purpose of this amendment is to convert a departure recommendation into a specific offense characteristic.

§ 2N3.1 Odometer Laws and Regulations

133. *Amendment:* Section 2N3.1 is amended by deleting:

"(b) If more than one vehicle was involved, apply § 2F1.1 (Offenses Involving Fraud or Deceit)."

and inserting in lieu thereof:

"(b) Cross Reference

(1) If the offense involved more than one vehicle, apply § 2F1.1 (Fraud and Deceit)."

Reason for Amendment: The purposes of this amendment are to correct a clerical error and to conform the phraseology of this subsection to that used elsewhere in the guidelines.

§ 2P1.1 Escape, Instigating or Assisting Escape

134. *Amendment:* Section 2P1.1(a) is amended by deleting:

"(1) 13, if from lawful custody resulting from a conviction or as a result of a lawful arrest for a felony;

(2) 8, if from lawful custody awaiting extradition, pursuant to designation as a recalcitrant witness or as a result of a lawful arrest for a misdemeanor."

and inserting in lieu thereof:

"(1) 13, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense;

(2) 8, otherwise."

Reason for Amendment: The purpose of this amendment is to clarify the language of the guideline by making it conform more closely to that used in 18 U.S.C. 751, the statute from which it was derived.

135. *Amendment:* Section 2P1.1(b)(3) is amended by deleting:

"If the defendant committed the offense while a correctional officer or other employee of the Department of Justice, increase by 2 levels."

and inserting in lieu thereof:

"If the defendant was a law enforcement or correctional officer or employee, or an employee of the Department of Justice, at the time of the offense, increase by 2 levels."

Reason for Amendment: The current specific offense characteristic (b)(3) applies only to correctional officers or Justice Department employees, and not to local or state law enforcement officers who might have custody of a federal prisoner, or even to federal law enforcement officers who are not employed by the Department of Justice (e.g., Secret Service agents are employed by the Treasury Department). It also does not appear to apply to law enforcement or correctional employees who are not sworn officers unless they are Justice Department employees. The purpose of this amendment is to correct this anomaly.

§ 2P1.2 Providing or Possessing Contraband in Prison

136. **Amendment:** Section 2P1.2(b)(1) is amended by deleting:

"If the defendant committed the offense while a correctional officer or other employee of the Department of Justice, increase by 2 levels."

and inserting in lieu thereof:

"If the defendant was a law enforcement or correctional officer or employee, or an employee of the Department of Justice, at the time of the offense, increase by 2 levels."

Reason for Amendment: The current specific offense characteristic (b)(1) applies only to correctional officers or Justice Department employees, and not to local or state law enforcement officers who might have custody of a federal prisoner, or even to federal law enforcement officers who are not employed by the Department of Justice (e.g., Secret Service agents are employed by the Treasury Department). It also does not appear to apply to enforcement or correctional employees who are not sworn officers unless they are Justice Department employees. The purpose of this amendment is to correct this anomaly.

137. **Amendment:** Section 2P1.2 is amended by inserting the following cross reference:

"(c) Cross Reference

(1) If the defendant is convicted under 18 U.S.C. 1791(a)(1) and is punishable under 18 U.S.C. 1791(b)(1), the offense level is 2 plus the offense level from § 2D1.1, but in no event less than level 26."

The Commentary to § 2P1.2 captioned "Application Note" is amended by deleting "Note" and inserting in lieu thereof "Notes", and by inserting the following as an additional Note:

"2. Pursuant to 18 U.S.C. 1791(c), as amended, a sentence imposed upon an inmate for a violation of 18 U.S.C. 1791 shall be consecutive to the sentence being served at the time of the violation."

Reason for Amendment: This amendment implements the direction to the Commission in Section 6468 of the Anti-Drug Abuse Act of 1988.

§ 2P1.4 Trespass on Bureau of Prisons Facilities

138. **Amendment:** Section 2p1.4 and the Commentary thereto are amended by deleting the entire text, including the title, as follows:

"§ 2P1.4. Trespass on Bureau of Prisons Facilities

(a) Base Offense Level: 6

Commentary

Statutory Provision: 18 U.S.C. 1793."

Reason for Amendment: The purpose of this amendment is to delete a guideline applying only to a petty offense. Petty offenses were deleted from coverage of the guidelines by the adoption of § 1B1.9 (effective June 15, 1988).

§ 2Q1.3 Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering and Falsification

139. **Amendment:** The Commentary to § 2Q1.3 captioned "Statutory Provisions" is amended by deleting "§ 4912,".

Reason for Amendment: The purpose of this amendment is to delete a reference to a petty offense.

§ 2Q1.4 Tampering or Attempted Tampering with Public Water System

140. **Amendment:** Section 2Q1.4(b)(1) is amended by inserting "bodily" immediately preceding "injury".

The Commentary to § 2Q1.4 captioned "Application Note" is amended by deleting Note 1 and inserting in lieu thereof:

"1. 'Serious bodily injury' is defined in the Commentary to § 1B1.1 (Application Instructions)."

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

§ 2Q1.5 Threatened Tampering with Public Water System

141. **Amendment:** Section 2Q1.5(b) is amended by deleting:

"(2) If the purpose of the offense was to influence government action or to extort money, increase by 8 levels."

and by inserting as a new subsection:

"(c) Cross Reference

(1) If the purpose of the offense was to influence government action or to extort money, apply § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage)."

Section 2Q1.5(b) is amended by deleting "Characteristics" and inserting in lieu thereof "Characteristic".

Reason for Amendment: The purposes of this amendment are to convert a specific offense characteristic to a cross-reference and render the guidelines internally more consistent.

§ 2Q1.6 Hazardous or Injurious Devices on Federal Lands

142. **Amendment:** Chapter Two, Part Q, Subpart 1, is amended by inserting the following additional guideline and accompanying Commentary:

"§ 2Q1.6. Hazardous or Injurious Devices on Federal Lands

(a) Base Offense Level (Apply the greatest):

(1) If the intent was to violate the Controlled Substance Act, apply § 2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances);

(2) If the intent was to obstruct the harvesting of timber, and property destruction resulted, apply § 2B1.3 (Property Damage or Destruction (Other Than by Arson or Explosives));

(3) If the offense involved reckless disregard to the risk that another person would be placed in danger of death or serious bodily injury under circumstances manifesting extreme indifference to such risk, the offense level from § 2A2.2 (Aggravated Assault);

(4) 6, otherwise.

Statutory Provision: 18 U.S.C. 1864.

Background: The statute covered by this guideline proscribes a wide variety of conduct, ranging from placing nails in trees to interfere with harvesting equipment to placing anti-personnel devices capable of causing death or serious bodily injury to protect the unlawful production of a controlled substance. Subsections (a)(1)-(a)(3) cover the more serious forms of this offense. Subsection (a)(4) provides a minimum offense level of 6 where the intent was to obstruct the harvesting of timber and little or no property damage resulted."

Reason for Amendment: The proposed amendment adds a guideline to cover an offense created by Section 6254(f) of the Anti-Drug Abuse Act of 1988.

§ 2Q2.1 Specially Protected Fish, Wildlife, and Plants

§ 2Q2.2 Lacey Act: Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants

143. **Amendment:** Section 2Q2.1 is amended in the title by inserting at the end "; Smuggling and Otherwise

Unlawfully Dealing in Fish, Wildlife, and Plants".

The Commentary to § 2Q2.1 captioned "Statutory Provisions" is amended by inserting immediately before the period at the end ", 3373(d); 18 U.S.C. 545".

The Commentary to § 2Q2.1 captioned "Background" is amended by deleting "and the Fur Seal Act. These statutes provide special protection to particular species of fish, wildlife and plants." and inserting in lieu thereof "the Fur Seal Act, the Lacey Act, and to violations of 18 U.S.C. 545 where the smuggling activity involved fish, wildlife, or plants."

Section 2Q2.2 is amended by deleting the guideline and the Commentary thereto, including the title, in its entirety, as follows:

"§ 2Q2.2. Lacey Act; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants

(a) Base Offense Level:

- (1) 6, if the defendant knowingly imported or exported fish, wildlife, or plants, or knowingly engaged in conduct involving the sale or purchase of fish, wildlife, or plants with a market value greater than \$350; or
- (2) 4.

(b) Specific Offense Characteristics

- (1) If the offense involved a commercial purpose, increase by 2 levels.
- (2) If the offense involved fish, wildlife, or plants that were not quarantined as required by law, increase by 2 levels.
- (3) Apply the greater:
 - (A) If the market value of the fish, wildlife, or plants exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit); or
 - (B) If the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the overall population of the species or to a discrete subpopulation, increase by 4 levels.

Commentary

Statutory Provisions: 16 U.S.C. 3773(d); 18 U.S.C. 545.

Application Note:

1. This section applies to violations of 18 U.S.C. 545 where the smuggling activity involved fish, wildlife, or plants. In other cases, see §§ 2T3.1 and 2T3.2.

Background: This section applies to violations of the Lacey Act Amendments of 1981, 16 U.S.C. 3373(d), and to violations of 18 U.S.C. 545 where the smuggling activity involved fish, wildlife, or plants. These are the principal enforcement statutes utilized to combat interstate and foreign commerce in unlawfully taken fish, wildlife, and plants. The adjustments for specific offense characteristics are identical to those in § 2Q2.1."

Reason for Amendment: The purpose of this amendment is to consolidate two

guidelines that cover very similar offenses.

144. *Amendment:* Section 2Q2.1(b)(3) is amended by deleting "Apply the greater:" and inserting in lieu thereof "(If more than one applies, use the greater):".

Reason for Amendment: The purpose of this amendment is to conform the guideline to the style of other guidelines.

§ 2R1.1 Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors

145. *Amendment:* Section 2R1.1(b)(2) is amended in the first column of the table by deleting:

- "Volume of Commerce
(A) less than \$1,000,000
(B) \$1,000,000-\$4,000,000
(C) \$4,000,001-\$15,000,000
(D) \$15,000,001-\$50,000,000
(E) over \$50,000,000",

and inserting in lieu thereof:

- "Volume of Commerce (Apply the Greatest)
(A) Less than \$1,000,000
(B) \$1,000,000-\$4,000,000
(C) More than \$4,000,000
(D) More than \$15,000,000
(E) More than \$50,000,000".

Reason for Amendment: The purpose of this amendment is to eliminate minor gaps in the loss table.

§ 2S1.1 Laundering of Monetary Instruments

146. *Amendment:* Section 2S1.1(b)(2) is amended in the first column of the table by deleting:

- "Value
(A) \$100,000 or less
(B) \$100,001-\$200,000
(C) \$200,001-\$350,000
(D) \$350,001-\$600,000
(E) \$600,001-\$1,000,000
(F) \$1,000,001-\$2,000,000
(G) \$2,000,001-\$3,500,000
(H) \$3,500,001-\$6,000,000
(I) \$6,000,001-\$10,000,000
(J) \$10,000,001-\$20,000,000
(K) \$20,000,001-\$35,000,000
(L) \$35,000,001-\$60,000,000
(M) \$60,000,001-\$100,000,000
(N) more than \$100,000,000",

and inserting in lieu thereof:

- "Value (Apply the Greatest)
(A) \$100,000 or less
(B) More than \$100,000
(C) More than \$200,000
(D) More than \$350,000
(E) More than \$600,000
(F) More than \$1,000,000
(G) More than \$2,000,000
(H) More than \$3,500,000
(I) More than \$6,000,000
(J) More than \$10,000,000
(K) More than \$20,000,000
(L) More than \$35,000,000
(M) More than \$60,000,000

(N) More than \$100,000,000".

Reason for Amendment: The purpose of this amendment is to eliminate minor gaps in the value table.

147. *Amendment:* The Commentary to § 2S1.1 captioned "Background" is amended in the third paragraph by adding the following new sentence at the end thereof: "Effective November 18, 1988, 18 U.S.C. 1956(a)(1)(A) contains two subdivisions.

The base offense level of 23 applies to section 1956(a)(1)(A) (i) and (ii)."

Reason for Amendment: The purpose of this amendment is to reflect a statutory revision made by Section 6471 of the Anti-Drug Abuse Act of 1988.

148. *Amendment:* The Commentary to § 2S1.1 captioned "Background" is amended in the fourth paragraph by deleting "scope of the criminal enterprise as well as the degree of the defendant's involvement" and inserting in lieu thereof "magnitude of the criminal enterprise, and the extent to which the defendant aided the enterprise".

Reason for Amendment: The purpose of this amendment is to clarify the Commentary.

§ 2S1.2 Engaging in Monetary Transactions in Property Derived From Specified Unlawful Activity

149. *Amendment:* Section 2S1.2(b)(1)(A) is amended by adding at the end "or".

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

§ 2S1.3 Failure to Report Monetary Transactions; Structuring Transactions to Evade Reporting Requirements

150. *Amendment:* Section 2S1.3(a)(1)(C) is amended by deleting "the proceeds of criminal activity" and inserting in lieu thereof "criminally derived property", and in subsection (b)(1) by inserting "property" immediately following "criminally derived".

The Commentary to § 2S1.3 captioned "Application Note" is amended by deleting:

"1. As used in this guideline, funds or other property are the 'proceeds of criminal activity' or 'criminally derived' if they are 'criminally derived property,' within the meaning of 18 U.S.C. 1957."

and inserting in lieu thereof:

"1. 'Criminally derived property' means any property constituting, or derived from, proceeds obtained from a criminal offense. See 18 U.S.C. 1957(f)(2)."

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

151. *Amendment:* The Commentary to § 2S1.3 captioned "Statutory Provisions" is amended by inserting immediately before "31 U.S.C." "26 U.S.C. 7203 (if a willful violation of 26 U.S.C. 6050I);".

Reason for Amendment: The purpose of this amendment is to conform the guideline to a revision of the relevant statute.

152. *Amendment:* Section 2S1.3(a)(1)(A) is amended by adding "or" immediately following "requirements";.

Section 2S1.3(a)(1)(B) is amended by deleting "activity" and inserting in lieu thereof "evasion of reporting requirements";.

The Commentary to § 2S1.3 captioned "Application Note" is amended in the captioned by deleting "Note" and inserting in lieu thereof "Notes", and by inserting the following as an additional Note:

"2. Subsection (a)(1)(C) applies where a reasonable person would have believed from the circumstances that the funds were criminally derived property. Subsection (b)(1) applies if the defendant knew or believed the funds were criminally derived property. Subsection (b)(1) applies in addition to, and not in lieu of, subsection (a)(1)(C). Where subsection (b)(1) applies, subsection (a)(1)(C) also will apply. It is possible that a defendant 'believed' or 'reasonably should have believed' that the funds were criminally derived property even if, in fact, the funds were not so derived (e.g., in a 'sting' operation where the defendant is told the funds were derived from the unlawful sale of controlled substances);".

The Commentary to § 2S1.3 captioned "Background" is amended by deleting:

"The base offense level is set at 13 for the great majority of cases. However, the base offense level is set at 5 for those cases in which these offenses may be committed with innocent motives and the defendant reasonably believed that the funds were from legitimate sources. The higher base offense level applies in all other cases. The offense level is increased by 5 levels if the defendant knew that the funds were criminally derived";.

and inserting in lieu thereof:

"A base offense level of 13 is provided for those offenses where the defendant either structured the transaction to evade reporting requirements, made false statements to conceal or disguise the activity, or reasonably should have believed that the funds were criminally derived property. A lower alternative base offense level of 5 is provided in all other cases. The Commission anticipates that such cases will involve simple recordkeeping or other more minor technical violations of the regulatory scheme governing certain monetary transactions committed by defendants who reasonably

believe that the funds at issue emanated from legitimate sources.

Where the defendant actually knew or believed that the funds were criminally derived property, subsection (b)(1) provides for a 5 level increase in the offense level";.

The Commentary to § 2S1.3 captioned "Statutory Provisions" is amended by inserting "18 U.S.C. 1005;" immediately following "Provisions";.

Reason for Amendment: The purposes of this amendment are to clarify the guideline and Commentary, to provide more complete statutory references, and to conform the format of the guideline to that used in other guidelines.

§ 2T1.1 Tax Evasion

153. *Amendment:* Section 2T1.1(a) is amended by deleting "When more than one year is involved, the tax losses are to be added";.

The Commentary to § 2T1.1 captioned "Application Notes" is amended in Note 2 by deleting "The court is to determine this amount as it would any other guideline factor." and inserting in lieu thereof "Although the definition of tax loss corresponds to what is commonly called the 'criminal deficiency,' its amount is to be determined by the same rules applicable in determining any other sentencing factor";.

The Commentary to § 2T1.1 captioned "Application Notes" is amended in Note 3 by deleting:

"Although the definition of tax loss corresponds to what is commonly called the 'criminal deficiency,' its amount is to be determined by the same rules applicable in determining any other sentencing factor. In accordance with the 'relevant conduct' approach adopted by the guidelines, tax losses resulting from more than one year are to be added whether or not the defendant is convicted of multiple counts";.

and by inserting in lieu thereof:

"In determining the total tax loss attributable to the offense (see § 1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. The following examples are illustrative of conduct that is part of the same course of conduct or common scheme or plan: (a) There is a continuing pattern of violations of the tax laws by the defendant; (b) the defendant uses a consistent method to evade or camouflage income, e.g., backdating documents or using off shore accounts; (c) the violations involve the same or a related series of transactions; (d) the violation in each instance involves a false or inflated claim of a similar deduction or credit; and (e) the violation in each instance involves a failure to report or an understatement of a specific source of income, e.g., interest from savings accounts or income from a particular business activity. These examples are not intended to be exhaustive";.

Reason for Amendment: The purposes of this amendment are to clarify the determination of tax loss and to make this instruction consistent among §§ 2T1.1-2T1.3.

154. *Amendment:* Section 2T1.1(a) is amended by deleting ", including interest to the date of filing an indictment or information". The Commentary to § 2T1.1 captioned "Application Notes" is amended in Note 2 by deleting ", plus interest to the date of the filing of an indictment or information" and by inserting "interest or" immediately before "penalties";.

Reason for Amendment: The purpose of this amendment is to simplify the application of the guideline by deleting interest from the calculation of tax loss.

155. *Amendment:* Section 2T1.1(b)(1) is amended by deleting "(A)" and ", or (B) the offense concealed or furthered criminal activity from which the defendant derived a substantial portion of his income", by inserting "or to correctly identify the source of" immediately after "report", and by deleting "per" and inserting in lieu thereof "in any";.

Reason for Amendment: The purposes of this amendment are to provide a more objective test for application of this enhancement, and to make clear that this enhancement applies if the defendant fails to report or disguises income exceeding \$10,000 from criminal activity in any year.

156. *Amendment:* The Commentary to § 2T1.1 captioned "Application Notes" is amended in Note 6 by deleting "Whether 'sophisticated means' were employed (§ 2T1.1(b)(2)) requires a subjective determination similar to that in § 2F1.1(b)(2)." and inserting in lieu thereof: "'Sophisticated means,' as used in § 2T1.1(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case";.

Reason for Amendment: The purpose of this amendment is to clarify the Commentary.

157. *Amendment:* The Commentary to § 2T1.1 captioned "Background" is amended in the second paragraph by deleting "Tax Table" wherever it appears and inserting in lieu thereof in each instance "Sentencing Table";.

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

§ 2T1.2 Willful Failure to File Return, Supply Information, or Pay Tax

158. *Amendment:* Section 2T1.2(b)(1) is amended by deleting "(A)" and ", or (B) the offense concealed or furthered criminal activity from which the

defendant derived a substantial portion of his income", by inserting "or to correctly identify the source of" immediately after "report", and by deleting "per" and inserting in lieu thereof "in any".

Reason for Amendment: The purposes of this amendment are to provide a more objective test for application of this enhancement, and to make clear that this enhancement applies if the defendant fails to report or disguises income exceeding \$10,000 from criminal activity in any year.

159. *Amendment:* Section 2T1.2 is amended by inserting the following as an additional subsection:

"(c) Cross Reference

(1) If the defendant is convicted of a willful violation of 26 U.S.C. 6050I, apply § 2S1.3 (Failure to Report Monetary Transactions) in lieu of this guideline."

The Commentary to § 2T.2 captioned "Statutory Provision" is amended by inserting immediately before the period at the end of the sentence "[other than a willful violation of 26 U.S.C. § 6050I]".

Reason for Amendment: The purpose of this amendment is to reflect a revision of 26 U.S.C. 6050I made by Section 7601 of the Anti-Drug Abuse Act of 1988.

160. *Amendment:* The Commentary to § 2T1.2 captioned "Application Notes" is amended in Note 2 by deleting "Whether 'sophisticated means' were employed (§ 2T1.2(b)(2)) requires a determination similar to that in § 2F1.1(b)(2)." and inserting in lieu thereof: "'Sophisticated means,' as used in § 2T1.2(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case."

Reason for Amendment: The purpose of this amendment is to clarify the Commentary.

161. *Amendment:* The Commentary to § 2T1.2 captioned "Application Note" is amended in the caption by deleting "Note" and inserting in lieu thereof "Notes", and by inserting the following additional Note:

"3. In determining the total tax loss attributable to the offense (see § 1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. See Application Note 3 of the Commentary to § 2T1.1."

Reason for Amendment: The purpose of this amendment is to clarify the determination of tax loss.

§ 2T1.3 Fraud and False Statements Under Penalty of Perjury

162. *Amendment:* Section 2T1.3(b)(1) is amended by deleting "(A)" and ", or (B) the offense concealed or furthered criminal activity from which the defendant derived a substantial portion of his income", by inserting "or to correctly identify the source of" immediately after "report", and by deleting "per" and inserting in lieu thereof "in any".

Reason for Amendment: The purposes of this amendment are to provide a more objective test for application of this enhancement, and to make clear that this enhancement applies if the defendant fails to report or disguises income exceeding \$10,000 from criminal activity in any year.

163. *Amendment:* The Commentary to § 2T1.3 captioned "Application Notes" is amended in Note 2 by deleting "Whether 'sophisticated means' were employed (§ 2T1.3(b)(2)) requires a determination similar to that in § 2F1.1(b)(2)." and inserting in lieu thereof: "'Sophisticated means,' as used in § 2T1.3(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case."

Reason for Amendment: The purpose of this amendment is to clarify the Commentary.

164. *Amendment:* The Commentary to § 2T1.3 captioned "Application Notes" is amended by inserting the following as an additional Note:

"3. In determining the total tax loss attributable to the offense (see § 1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. See Application Note 3 of the Commentary to § 2T1.1."

Reason for Amendment: The purpose of this amendment is to clarify the determination of tax loss.

§ 2T1.4 Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud

165. *Amendment:* The Commentary to § 2T1.4 captioned "Application Notes" is amended in Note 2 by deleting "Whether 'sophisticated means' were employed (§ 2T1.1(b)(2)) requires a determination similar to that in § 2F1.1(b)(2)." and inserting in lieu thereof: "'Sophisticated means,' as used in § 2T1.4(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case."

Reason for Amendment: The purpose of this amendment is to clarify the Commentary.

§ 2T1.6 Failing to Collect or Truthfully Account for and Pay Over Tax

166. *Amendment:* Section 2T1.6(a) is amended by deleting ", plus interest".

Reason for Amendment: The purpose of this amendment is to simplify the application of the guideline by deleting interest from the calculation of tax loss.

§ 2T1.9 Conspiracy to Impair, Impede or Defeat Tax

167. *Amendment:* Section 2T1.9(b) is amended by deleting "either of the following adjustments" and inserting in lieu thereof "more than one".

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

168. *Amendment:* The Commentary to section 2T1.9 captioned "Application Notes" is amended by deleting:

"2. The minimum base offense level is 10. If a tax loss from the conspiracy can be established under either § 2T1.1 or § 2T1.3 (whichever applies to the underlying conduct), and that tax loss corresponds to a higher offense level in the Tax Table (§ 2T4.1), use that higher base offense level.

3. The specific offense characteristics are in addition to those specified in § 2T1.1 and § 2T1.3.

4. Because the offense is a conspiracy, adjustments from Chapter Three, Part B (Role in the Offense) usually will apply."

and inserting in lieu thereof:

"2. The base offense level is the offense level (base offense level plus any applicable specific offense characteristics) from § 2T1.1 or § 2T1.3 (whichever is applicable to the underlying conduct) if that offense level is greater than 10. Otherwise, the base offense level is 10.

3. Specific offense characteristics from § 2T1.9(b) are to be applied to the base offense level determined under § 2T1.9(a)(1) or (2)."

Reason for Amendment: The purpose of this amendment is to clarify Application Notes 2 and 3. Application Note 4 (the content of which does not appear in any of the other guidelines covering conspiracy) is deleted as unnecessary.

§ 2T3.1 Evading Import Duties or Restrictions (Smuggling)

169. *Amendment:* The Commentary to § 2T3.1 captioned "Application Notes" is amended in Note 2 by inserting "if the increase in market value due to importation is not readily ascertainable" immediately following "United States".

Reason for Amendment: The purpose of this amendment is to clarify the Commentary.

§ 2T3.2 Receiving or Trafficking in Smuggled Property

170. *Amendment:* The Commentary to § 2T3.2 is amended by inserting at the end:

"Application Note:

1. Particular attention should be given to those items for which entry is prohibited, limited, or restricted. Especially when such items are harmful or protective quotas are in effect, the duties evaded on such items may not adequately reflect the harm to society or protected industries resulting from their importation. In such instances, the court should impose a sentence above the guideline. A sentence based upon an alternative measure of the 'duty' evaded, such as the increase in market value due to importation, or 25 percent of the items' fair market value in the United States if the increase in market value due to importation is not readily ascertainable, might be considered."

Reason for Amendment: The purpose of this amendment is to clarify the application of the guideline by adding the text from Application Note 2 of the Commentary to § 2T3.1, which applies equally to this guideline section.

§ 2T4.1 Tax Table

171. *Amendment:* Section 2T4.1 is amended in the first column of the tax table by deleting:

	Offense level
"Tax loss:	
(A) less than \$2,000	6
(B) \$2,000-\$5,000	7
(C) \$5,001-\$10,000	8
(D) \$10,001-\$20,000	9
(E) \$20,001-\$40,000	10
(F) \$40,001-\$80,000	11
(G) \$80,001-\$150,000	12
(H) \$150,001-\$300,000	13
(I) \$300,001-\$500,000	14
(J) \$500,001-\$1,000,000	15
(K) \$1,000,001-\$2,000,000	16
(L) \$2,000,001-\$5,000,000	17
(M) more than \$5,000,000	18"

and inserting in lieu thereof:

	Offense level
"Tax loss (apply the greatest):	
(A) \$2,000 or less	6
(B) More than \$2,000	7
(C) More than \$5,000	8
(D) More than \$10,000	9
(E) More than \$20,000	10
(F) More than \$40,000	11
(G) More than \$70,000	12
(H) More than \$120,000	13
(I) More than \$200,000	14
(J) More than \$350,000	15
(K) More than \$500,000	16
(L) More than \$800,000	17
(M) More than \$1,500,000	18
(N) More than \$2,500,000	19
(O) More than \$5,000,000	20

	Offense level
(P) More than \$10,000,000	21
(Q) More than \$20,000,000	22
(R) More than \$40,000,000	23
(S) More than \$80,000,000	24"

Reason for Amendment: The purposes of this amendment are to increase the offense levels for offenses with larger losses in order to provide additional deterrence and better reflect the seriousness of the conduct, and to eliminate minor gaps in the table.

§ 2X1.1 Attempt, Solicitation, or Conspiracy Not Covered by a Specific Guideline

172. *Amendment:* Section 2X1.1(b)(1) is amended by deleting "or solicitation".

Section 2X1.1(b) is amended by deleting:

"(3) If a solicitation, and the statute treats solicitation identically with the object of the offense, do not apply § 2X1.1(b)(1); i.e., the offense level for solicitation is the same as that for the object offense."

and inserting in lieu thereof:

"(3)(A) If a solicitation, decrease by 3 levels unless the person solicited to commit or aid the offense completed all the acts he believed necessary for successful completion of the object offense or the circumstances demonstrate that the person was about to complete all such acts but for apprehension or interruption by some similar event beyond such person's control.

(B) If the statute treats solicitation of the offense identically with the object offense, do not apply subdivision (A) above; i.e., the offense level for solicitation is the same as that for the object offense."

Reason for Amendment: The current subsection (b)(1) does not clearly address how a solicitation is to be treated where the person solicited to commit the offense completes all the acts necessary for the successful completion of the offense. The purpose of this amendment is to clarify the treatment of such cases in a manner consistent with the treatment of attempts and conspiracies.

173. *Amendment:* Section 2X1.1 is amended in the title by deleting "Not Covered by a Specific Guideline" and inserting in lieu thereof "(Not Covered by a Specific Offense Guideline)". Section 2X1.1 is amended by inserting the following additional subsection:

"(c) Cross Reference

(1) When an attempt, solicitation, or conspiracy is expressly covered by another offense-guideline section, apply that guideline section."

The Commentary to § 2X1.1 captioned "Application Notes" is amended by deleting Note 1 as follows:

"1. Certain attempts, conspiracies, and solicitations are covered by specific guidelines (e.g., § 2A2.1 includes attempt, conspiracy, or solicitation to commit murder; § 2A3.1 includes attempted criminal sexual abuse; and § 2D1.4 includes attempts and conspiracies to commit controlled substance offenses). Section 2X1.1 applies only in the absence of a more specific guideline."

and inserting in lieu thereof:

"1. Certain attempts, conspiracies, and solicitations are expressly covered by other offense guidelines.

Offense guidelines that expressly cover attempts include: § 2A2.1 (Assault With Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder); § 2A3.1 (Criminal Sexual Abuse; Attempt or Assault with the Intent to Commit Criminal Sexual Abuse); § 2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts); § 2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts); § 2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact); § 2A4.2 (Demanding or Receiving Ransom Money); § 2A5.1 (Aircraft Piracy or Attempted Aircraft Piracy); § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right); § 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity); § 2D1.4 (Attempts and Conspiracies); § 2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan); § 2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Serious Injury); § 2Q1.4 (Tampering or Attempted Tampering with Public Water System).

Offense guidelines that expressly cover conspiracies include: § 2A2.1 (Assault With Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder); § 2D1.4 (Attempts and Conspiracies); § 2H1.2 (Conspiracy to Interfere with Civil Rights); § 2T1.9 (Conspiracy to Impair, Impede or Defeat Tax).

Offense guidelines that expressly cover solicitations include: § 2A2.1 (Assault with Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder); § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right); § 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity); § 2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan)."

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

174. *Amendment:* The Commentary to § 2X1.1 captioned "Application Notes" is amended by deleting:

"4. If the defendant was convicted of conspiracy or solicitation and also for the completed offense, the conviction for the conspiracy or solicitation shall be imposed to run concurrently with the sentence for the

object offense, except in cases where it is otherwise specifically provided for by the guidelines or by law. 28 U.S.C. 994(1)(2)."

Reason for Amendment: The purpose of this amendment is to delete an application note that does not apply to any determination under this section. The circumstances which this application note addresses are covered under Chapter Three, Part D and Chapter Five, Part G.

175. Amendment: The Commentary to § 2X1.1 captioned "Application Notes" is amended by inserting the following as an additional Note:

"4. In certain cases, the participants may have completed (or have been about to complete but for apprehension or interruption) all of the acts necessary for the successful completion of part, but not all, of the intended offense. In such cases, the offense level for the count (or group of closely-related multiple counts) is whichever of the following is greater: the offense level for the intended offense minus 3 levels (under § 2X1.1 (b)(1), (b)(2), or (b)(3)(A)), or the offense level for the part of the offense for which the necessary acts were completed (or about to be completed but for apprehension or interruption). For example, where the intended offense was the theft of \$800,000 but the participants completed (or were about to complete) only the acts necessary to steal \$30,000, the offense level is the offense level for the theft of \$800,000 minus 3 levels, or the offense level for the theft of \$30,000, whichever is greater.

In the case of multiple counts that are not closely-related counts, whether the 3-level reduction under § 2X1.1(b) (1) or (2) applies is determined separately for each count."

Reason for Amendment: The purpose of this amendment is to clarify how the guidelines are to be applied to partially completed offenses.

176. Amendment: The Commentary to § 2X1.1 captioned "Application Notes" is amended in the last sentence of Note 2 by deleting "intended" and inserting in lieu thereof "attempted".

Reason for Amendment: The purpose of this amendment is to clarify the Commentary.

§ 2X3.1 Accessory After the Fact

177. Amendment: The Commentary to § 2X3.1 captioned "Application Notes" is amended in Note 1 by deleting:

"'Underlying offense' means the offense as to which the defendant was an accessory."

and inserting in lieu thereof:

"'Underlying offense' means the offense as to which the defendant is convicted of being an accessory. Apply the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant; see Application Note 1 of the Commentary to § 1B1.3 (Relevant Conduct)."

Reason for Amendment: The purpose of this amendment is to clarify the Commentary.

§ 2X4.1 Misprision of Felony

178. Amendment: The Commentary to § 2X4.1 captioned "Application Notes" is amended in Note 1 by deleting:

"'Underlying offense' means the offense as to which the misprision was committed."

and inserting in lieu thereof:

"'Underlying offense' means the offense as to which the defendant is convicted of committing the misprision. Apply the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant; see Application Note 1 of the Commentary to § 1B1.3 (Relevant Conduct)."

Reason for Amendment: The purpose of this amendment is to clarify the Commentary.

§ 3A1.1 Vulnerable Victim

179. Amendment: Section 3A1.1 is amended by deleting "the victim" wherever it appears and inserting in lieu thereof in each instance "a victim", and by inserting "otherwise" immediately before "particularly".

The Commentary to § 3A1.1 captioned "Application Notes" is amended in Note 1 by deleting:

"any offense where the victim's vulnerability played any part in the defendant's decision to commit the offense",

and inserting in lieu thereof:

"offenses where an unusually vulnerable victim is made a target of criminal activity by the defendant",

and by deleting:

"sold fraudulent securities to the general public and one of the purchasers",

and inserting in lieu thereof:

"sold fraudulent securities by mail to the general public and one of the victims".

Reason for Amendment: The purpose of the amendment is to clarify the guideline and Commentary.

§ 3A1.2 Official Victim

180. Amendment: Section 3A1.2 is amended by deleting "any law-enforcement or corrections officer, any other official as defined in 18 U.S.C. 1114, or a member of the immediate family thereof, and" and inserting in lieu thereof "a law enforcement or corrections officer; a former law enforcement or corrections officer; an officer or employee included in 18 U.S.C. 1114; a former officer or employee included in 18 U.S.C. 1114; or a member of the immediate family of any of the above, and".

Reason for Amendment: The purpose of this amendment is to expand the coverage of this provision to reflect a statutory revision effected by Section 6487 of the Anti-Drug Abuse Act of 1988.

181. Amendment: Section 3A1.2 is amended by deleting "If the victim" and inserting in lieu thereof:

"If—
(a) the victim",

and by deleting "crime was motivated by such status, increase by 3 levels." and inserting in lieu thereof:

"offense of conviction was motivated by such status; or

(b) during the course of the offense or immediate flight therefrom, the defendant or a person for whose conduct the defendant is otherwise accountable, knowing or having reasonable cause to believe that a person was a law enforcement or corrections officer, assaulted such officer in a manner creating a substantial risk of serious bodily injury, increase by 3 levels."

The Commentary to § 3A1.2 captioned "Application Notes" is amended by adding at the end the following:

"4. 'Motivated by such status' in subdivision (a) means that the offense of conviction was motivated by the fact that the victim was a law enforcement or corrections officer or other person covered under 18 U.S.C. 1114, or a member of the immediate family thereof. This adjustment would not apply, for example, where both the defendant and victim were employed by the same government agency and the offense was motivated by a personal dispute.

5. Subdivision (b) applies in circumstances tantamount to aggravated assault against a law enforcement or corrections officer, committed in the course of, or in immediate flight following, another offense, such as bank robbery. While this subsection may apply in connection with a variety of offenses that are not by nature targeted against official victims, its applicability is limited to assaultive conduct against law enforcement or corrections officers that is sufficiently serious to create at least a 'substantial risk of serious bodily injury' and that is proximate in time to the commission of the offense.

6. The phrase 'substantial risk of serious bodily injury' in subdivision (b) is a threshold level of harm that includes any more serious injury that was risked, as well as actual serious bodily injury (or more serious harm) if it occurs."

Reason for Amendment: The purpose of the amendment is to set forth more clearly the categories of cases to which this adjustment is intended to apply.

182. Amendment: The Commentary to § 3A1.2 captioned "Application Notes" is amended in Note 3 by inserting the following as an additional sentence:

"In most cases, the offenses to which subdivision (a) will apply will be from Chapter Two, Part A (Offenses Against the Person). The only offense guideline in

Chapter Two, Part A that specifically incorporates this factor is § 2A2.4 (Obstructing or Impeding Officers)."

Reason for Amendment: The purpose of this amendment is to clarify the application of the guideline.

§ 3A1.3 Restraint of Victim

183. *Amendment:* Section 3A1.3 is amended by deleting "the victim of a crime" and inserting in lieu thereof "a victim".

The Commentary to § 3A1.3 captioned "Application Notes" is amended in Note 2 by deleting "the victim" and inserting in lieu thereof "a victim".

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

184. *Amendment:* The Commentary to § 3A1.3 captioned "Application Notes" is amended by inserting as an additional Note:

"3. If the restraint was sufficiently egregious, an upward departure may be warranted. See § 5K2.4 (Abduction or Unlawful Restraint)."

Reason for Amendment: The purpose of this amendment is to clarify the relationship between § 3A1.3 and § 5K2.4.

§ 3C1.1 Willfully Obstructing or Impeding Proceedings

185. *Amendment:* Section 3C1.1 is amended by deleting "from Chapter Two".

Reason for Amendment: The purpose of this amendment is to delete an incorrect reference.

186. *Amendment:* The Commentary to § 3C1.1 captioned "Application Notes" is amended in Note 4 by deleting:

"except in determining the combined offense level as specified in Chapter Three, Part D (Multiple Counts). Under § 3D1.2(e), a count for obstruction will be grouped with the count for the underlying offense. Ordinarily, the offense level for that Group of Closely Related Counts will be the offense level for the underlying offense, as increased by the 2-level adjustment specified by this section. In some instances, however, the offense level for the obstruction offense may be higher, in which case that will be the offense level for the Group. See § 3D1.3(a). In cases in which a significant further obstruction occurred during the investigation or prosecution of an obstruction offense itself (one of the above listed offenses), an upward departure may be warranted (e.g., where a witness to an obstruction offense is threatened during the course of the prosecution for the obstruction offense)."

and inserting in lieu thereof:

"to the offense level for that offense except where a significant further obstruction occurred during the investigation or prosecution of the obstruction offense itself (e.g., where the defendant threatened a

witness during the course of the prosecution for the obstruction offense). Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of § 3D1.2 (Groups of Closely-Related Counts). The offense level for that Group of Closely-Related Counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater."

Reason for Amendment: The purpose of this amendment is to resolve an inconsistency between the Commentary in this section and the Commentaries in Chapter Two, Part J.

§ 3D1.2 Groups of Closely-Related Counts

187. *Amendment:* Section 3D1.2(b)(3) is amended by deleting "section 994(u)" and inserting in lieu thereof "section 994(v)".

Section 3D1.2(d) is amended by deleting "2D1.3", "2C3.2", and "2P1.4".

Reason for Amendment: The purposes of this amendment are to correct an erroneous reference, and to delete references to two guidelines covering petty offenses that have been deleted and to a guideline that has been deleted by consolidation with another guideline.

188. *Amendment:* The Commentary to § 3D1.2 captioned "Application Notes" is amended in Note 3 by deleting "(6)", "(7)", and "(8)" and inserting in lieu thereof "(5)", "(6)", and "(7)" respectively.

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

189. *Amendment:* The Commentary to § 3D1.2 captioned "Application Notes" is amended in Note 9 by inserting after the second sentence:

"See § 1B1.2(d) and accompanying commentary."

Reason for Amendment: The purpose of this amendment is to cross reference the newly created guideline subsection dealing with a multiple object conspiracy.

190. *Amendment:* The Commentary to § 3D1.2 captioned "Background" is amended by deleting:

"In general, counts are grouped together only when they involve both the same victim (or societal harm in 'victimless' offenses) and the same or contemporaneous transactions, except as provided in § 3D1.2 (c) or (d)."

and inserting in lieu thereof:

"Counts involving different victims (or societal harms in the case of 'victimless' crimes) are grouped together only as provided in subsection (c) or (d)."

Reason for Amendment: The purpose of this amendment is to clarify the Commentary.

§ 3D1.3 Offense Level Applicable to Each Group of Closely-Related Counts

191. *Amendment:* Section 3D1.3(b) is amended in the second sentence by deleting "varying", and by inserting "of the same general type to which different guidelines apply (e.g., theft and fraud)" immediately following "offenses".

Reason for Amendment: The purpose of this amendment is to enhance the clarity of the guideline.

§ 3E1.1 Acceptance of Responsibility

192. *Amendment:* The Commentary to § 3E1.1 captioned "Application Notes" is amended by deleting:

"4. An adjustment under this section is not warranted where a defendant perjures himself, suborns perjury, or otherwise obstructs the trial or the administration of justice (see § 3C1.1), regardless of other factors."

and inserting in lieu thereof:

"4. Conduct resulting in an enhancement under § 3C1.1 (Willfully Obstructing or Impeding Proceedings) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply."

Reason for Amendment: The purposes of this amendment are to provide for extraordinary cases in which adjustments under both § 3C1.1 and § 3E1.1 are appropriate, and to clarify the reference to obstructive conduct.

§ 4A1.1 Criminal History Category

193. *Amendment:* Section 4A1.1(e) is amended by inserting "or while in imprisonment or escape status on such a sentence" immediately before the period at the end of the first sentence.

The Commentary to § 4A1.1 captioned "Application Notes" is amended in the second sentence of Note 5 by deleting "still in confinement" and inserting in lieu thereof "in imprisonment or escape status".

Reason for Amendment: The purpose of this amendment is to clarify that subsection (e) applies to defendants who are still in confinement status at the time of the instant offense (e.g., a defendant who commits the instant offense while in prison or on escape status).

194. *Amendment:* The Commentary to § 4A1.1 captioned "Application Notes" is amended in Note 4 by inserting at the end the following additional sentence: "For the purposes of this item, a 'criminal justice sentence' means a

sentence countable under § 4A1.2 (Definitions and Instructions for Computing Criminal History)."

Reason for Amendment: The purpose of this amendment is to clarify the application of the guideline.

195. *Amendment:* The Commentary to § 4A1.1 captioned "Background" is amended in the third paragraph by inserting "a" immediately before "criminal", and by deleting "control" and inserting in lieu thereof "sentence".

Reason for Amendment: The purpose of this amendment is to conform the Commentary to the guideline.

§ 4A1.2 Definitions and Instructions for Computing Criminal History

196. *Amendment:* Section 4A1.2(e)(1) is amended by inserting ", whenever imposed," immediately preceding "that resulted", and deleting "defendant's incarceration" and inserting in lieu thereof "defendant being incarcerated".

Reason for Amendment: The purpose of this amendment is to make clear that "resulted in the defendant's incarceration" applies to any part of the defendant's imprisonment and not only to the commencement of the defendant's imprisonment.

197. *Amendment:* Section 4A1.2(e) is amended by inserting, as an additional subsection, the following:

"(4) The applicable time period for certain sentences resulting from offenses committed prior to age eighteen is governed by § 4A1.2(d)(2)."

Reason for Amendment: The purpose of this amendment is to clarify the relationship between § 4A1.2(d)(2) and (e).

198. *Amendment:* Section 4A1.2(f) is amended by inserting ", or a plea of nolo contendere," immediately following "admission of guilt".

Reason for Amendment: The purpose of this amendment is to clarify that a plea of nolo contendere is equivalent to a finding of guilt for the purpose of § 4A1.2(f).

199. *Amendment:* The Commentary to § 4A1.2 captioned "Application Notes" is amended in Note 8 by deleting "4A1.2(e)" and inserting in lieu thereof "4A1.2 (d)(2) and (e)" and by inserting the following new sentence immediately after the first sentence:

"As used in § 4A1.2 (d)(2) and (e), the term 'commencement of the instant offense' includes any relevant conduct. See § 1B1.3 (Relevant Conduct)."

Reason for Amendment: The purposes of this amendment are to correct a clerical error by inserting a reference to § 4A1.2(d)(2), and to clarify that "commencement of the instant offense" includes any relevant conduct.

§ 4B1.1 Career Offender

200. *Amendment:* Section 4B1.1 is amended by deleting "Offense Level" and inserting in lieu thereof "Offense Level*", and by inserting at the end:

"*If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by 2 levels."

Reason for Amendment: The purpose of this amendment is to authorize the application of § 3E1.1 (Acceptance of Responsibility) to the determination of the offense level under this section.

201. *Amendment:* The Commentary to § 4B1.1 captioned "Application Note" is amended by inserting as a new Note:

"2. 'Offense Statutory Maximum' refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense. If more than one count of conviction is of a crime of violence or controlled substance offense, use the maximum authorized term of imprisonment for the count that authorizes the greatest maximum term of imprisonment."

and in the caption by deleting "Note" and inserting in lieu thereof "Notes".

The Commentary to § 4B1.1 captioned "Background" is amended by deleting "128 Cong. Rec. 12792, 97th Cong., 2d Sess. (1982) ('Career Criminals' amendment No. 13 by Senator Kennedy), 12796 (explanation of amendment), and 12798 (remarks by Senator Kennedy)" and inserting in lieu thereof: "128 Cong. Rec. 26, 511-12 (1982) (text of 'Career Criminals' amendment by Senator Kennedy), 26, 515 (brief summary of amendment), 26, 517-18 (statement of Senator Kennedy)".

Reason for Amendment: The purposes of this amendment are to clarify the operation of the guideline and to provide a citation to the more readily available edition of the Congressional Record.

§ 4B1.2 Definitions

202. *Amendment:* Section 4B1.2 is amended by deleting "is defined under 18 U.S.C. 16" and inserting in lieu thereof:

"means any offense under federal or state law punishable by imprisonment for a term exceeding one year that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."

Section 4B1.2 is amended by deleting "identified in 21 U.S.C. 841, 845(b), 856, 952(a), 955, 955(a), 959; and similar offenses" and inserting in lieu thereof:

"under a federal or state law prohibiting the manufacture, import, export, or distribution of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, or distribute."

The Commentary to § 4B1.2 captioned "Application Notes" is amended by deleting:

"1. 'Crime of violence' is defined in 18 U.S.C. 16 to mean an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that by its nature involves a substantial risk that physical force against the person or property of another may be used in committing the offense. The Commission interprets this as follows: murder, manslaughter, kidnapping, aggravated assault, extortionate extension of credit, forcible sex offenses, arson, or robbery are covered by this provision. Other offenses are covered only if the conduct for which the defendant was specifically convicted meets the above definition. For example, conviction for an escape accomplished by force or threat of injury would be covered; conviction for an escape by stealth would not be covered. Conviction for burglary of a dwelling would be covered; conviction for burglary of other structures would not be covered.

2. 'Controlled substance offense' includes any federal or state offense that is substantially similar to any of those listed in subsection (2) of the guideline. These offenses include manufacturing, importing, distributing, dispensing, or possessing with intent to manufacture, import, distribute, or dispense, a controlled substance (or a counterfeit substance). This definition also includes aiding and abetting, conspiring, or attempting to commit such offenses, and other offenses that are substantially equivalent to the offenses listed."

and inserting in lieu thereof:

"1. The terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

2. 'Crime of violence' includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use, of physical force against the person of another, or (B) the conduct set forth in the count of which the defendant was convicted included use of explosives or, by its nature, presented a serious potential risk of physical injury to another."

The Commentary to § 4B1.2 captioned "Application Notes" is amended in Note 4 by deleting "§ 4A1.2(e) (Applicable Time Period), § 4A1.2(h) (Foreign Sentences), and § 4A1.2(j) (Expunged Convictions)" and inserting in lieu thereof "§ 4A1.2 (Definitions and

Instructions for Computing Criminal History)", and by deleting "Also applicable is the Commentary to § 4A1.2 pertaining to invalid convictions."

Reason for Amendment: The purpose of this amendment is to clarify the definitions of crime of violence and controlled substance offense used in this guideline. The definition of crime of violence used in this amendment is derived from 18 U.S.C. 924(e). In addition, the amendment clarifies that all pertinent definitions and instructions in § 4B1.2 apply to this section.

§ 4B1.3 Criminal Livelihood

203. Amendment: Section 4B1.3 is amended by deleting "from which he derived a substantial portion of his income" and inserting in lieu thereof "engaged in as a livelihood".

The Commentary to § 4B1.3 captioned "Application Note" is amended by deleting "Note" and inserting in lieu thereof "Notes", and by inserting as an additional Note:

"2. 'Engaged in as a livelihood' means that (1) the defendant derived income from the pattern of criminal conduct that in any twelve-month period exceeded 2,000 times the then existing hourly minimum wage under federal law (currently 2,000 × the hourly minimum wage under Federal law is \$6,700); and (2) the totality of circumstances shows that such criminal conduct was the defendant's primary occupation in that twelve-month period (e.g., the defendant engaged in criminal conduct rather than regular, legitimate employment; or the defendant's legitimate employment was merely a front for his criminal conduct)."

The Commentary to § 4B1.3 captioned "Application Notes" is amended in Note 1 by deleting "This guideline is not intended to apply to minor offenses."

The Commentary to § 4B1.3 captioned "Background" is amended by deleting "proportion" and inserting in lieu thereof "portion".

Reason for Amendment: The purpose of this amendment is to provide a better definition of the intended scope of this enhancement. Compare, for example, *U.S. v. Kerr*, 686 F. Supp. 1174 (W.D. Penn. 1988) with *U.S. v. Rivera*, 694 F. Supp. 1105 (S.D. N.Y. 1988). The first prong of the proposed definition in application Note 2 above is derived from former 18 U.S.C. 3575, the provision from which the statutory instruction underlying this guideline (28 U.S.C. 994 (i)(2)) was itself derived.

Chapter Five, Part A—Sentencing Table

204. Amendment: Chapter 5, Part A is amended in the Sentencing Table by deleting "0-1, 0-2, 0-3, 0-4, and 0-5" wherever it appears, and inserting in each instance "0-6".

Reason for Amendment: This amendment provides that the maximum of the guideline range is six months wherever the minimum of the guideline range is zero months. The court has discretion to impose a sentence of up to 6 months or a \$5,000 fine for a Class B misdemeanor (Class B or C misdemeanors and infractions are not covered by the guidelines; see § 1B1.9). It appears anomalous that the Commission guidelines allow less discretion for certain felonies and Class A misdemeanors. In fact, in certain cases, a plea to a reduced charge of a Class B misdemeanor could result in a higher potential sentence because the sentence for the felony or Class A misdemeanor might be restricted to less than 6 months by the guidelines. This can happen when the Sentencing Table provides a guideline range of 0-1 month, 0-2 months, 0-3, 0-4, or 0-5 months. These very narrow ranges are not required by statute, which allows a 6 month guideline range in such cases.

This anomaly is removed by amending the guideline table to provide that whenever the lower limit of the guideline range is 0 months, the upper limit of the guideline range is six months.

There is a similar anomaly in the Fine Table at § 5E4.2, in that the maximum of the fine table is, in certain cases, less than the \$5,000 authorized for petty offenses.

Providing a fine range of \$100-\$5,000 for an offense level of 3 or less, and \$250-\$5,000 for an offense level of 4 or 5, removes this anomaly. Moreover, because the guidelines now cover only Class A misdemeanors and felonies, the amendment increases the minimum fine guideline to \$100.

Chapter Five, Parts B—F

205. Amendment: Section 5B1.4(b)(20) is amended by inserting ", but only as a substitute for imprisonment" immediately following "release".

Section 5C2.1(c)(2) is amended by deleting "or community confinement" and inserting in lieu thereof ", community confinement, or home detention".

Section 5C2.1(c)(3) is amended by inserting "or home detention" immediately following "community confinement".

Section 5C2.1(d)(2) is amended by inserting "or home detention" immediately following "community confinement".

Section 5C2.1(e) is amended by inserting at the end:

"(3) One day of home detention for one day of imprisonment."

and by deleting the period at the end of subsection (e)(2) and inserting a semicolon in lieu thereof.

The Commentary to § 5C2.1 captioned "Application Notes" is amended in the first sentence of the second subparagraph of Note 3 by deleting "intermittent confinement or community confinement, or combination of intermittent and community confinement," and by inserting in lieu thereof "intermittent confinement, community confinement, or home detention, or combination of intermittent confinement, community confinement, and home detention,".

The Commentary to § 5C2.1 captioned "Application Notes" is amended in the second sentence of the second subparagraph of Note 3 by deleting "intermittent or community confinement" and by inserting in lieu thereof "intermittent confinement, community confinement, or home detention".

The Commentary to § 5C2.1 captioned "Application Notes" is amended in the third subparagraph of Note 3 by inserting "or home detention" immediately following "community confinement", wherever it appears.

The Commentary to § 5C2.1 captioned "Application Notes" is amended in the last paragraph of Note 3 by inserting "or home detention" immediately following "community confinement", wherever it appears.

The Commentary to § 5C2.1 captioned "Application Notes" is amended in Note 4 by inserting "or home detention" immediately following "community confinement", wherever it appears.

The Commentary to § 5C2.1 captioned "Application Notes" is amended in Note 5 by deleting "Home detention may not be substituted for imprisonment."

Section 5F5.2 is amended by inserting ", but only as a substitute for imprisonment" immediately following "release".

The Commentary to § 5F5.2 captioned "Application Notes" is amended in Note 1 by deleting:

"'Home detention' means a program of confinement and supervision that restricts the defendant to his place of residence continuously, or during specified hours, enforced by appropriate means of surveillance by the probation office. The judge may also impose other conditions of probation or supervised release appropriate to effectuate home detention. If the confinement is only during specified hours, the defendant shall engage exclusively in gainful employment, community service or treatment during the non-residential hours."

and inserting in lieu thereof:

"Home detention" means a program of confinement and supervision that restricts the defendant to his place of residence continuously, except for authorized absences, enforced by appropriate means of surveillance by the probation office. When an order of home detention is imposed, the defendant is required to be in his place of residence at all times except for approved absences for gainful employment, community service, religious services, medical care, educational or training programs, and at such other times as may be specifically authorized. Electronic monitoring is an appropriate means of surveillance and ordinarily should be used in connection with home detention. However, alternative means of surveillance may be used so long as they are as effective as electronic monitoring."

The Commentary to § 5F5.2 captioned "Application Notes" is amended in Note 2 by deleting:

"Home detention generally should not be imposed for a period in excess of six months. However, a longer term may be appropriate for disabled, elderly or extremely ill defendants who would otherwise be imprisoned."

and by inserting in lieu thereof:

"The court may impose other conditions of probation or supervised release appropriate to effectuate home detention. If the court concludes that the amenities available in the residence of a defendant would cause home detention not to be sufficiently punitive, the court may limit the amenities available."

The Commentary to § 5F5.2 captioned "Application Notes" is amended by inserting the following as an additional Note:

"3. The defendant's place of residence, for purposes of home detention, need not be the place where the defendant previously resided. It may be any place of residence, so long as the owner of the residence (and any other person(s) from whom consent is necessary) agrees to any conditions that may be imposed by the court, e.g., conditions that a monitoring system be installed, that there will be no "call forwarding" or "call waiting" services, or that there will be no cordless telephones or answering machines."

The Commentary to § 5F5.2 is amended by inserting the following at the end:

"Background: The Commission has concluded that the surveillance necessary for effective use of home detention ordinarily requires electronic monitoring. However, in some cases home detention may effectively be enforced without electronic monitoring, e.g., when the defendant is physically incapacitated, or where some other effective means of surveillance is available. Accordingly, the Commission has not required that electronic monitoring be a necessary condition for home detention. Nevertheless, before ordering home detention without electronic monitoring, the court should be confident that an alternative form of surveillance will be equally effective.

In the usual case, the Commission assumes that a condition requiring that the defendant seek and maintain gainful employment will be imposed when home detention is ordered."

Reason for Amendment: The purpose of this amendment is to conform the guidelines with Section 7305 of the Anti-Drug Abuse Act of 1988.

206. Amendment: Section 5B1.4(b) is amended by inserting the following additional paragraph at the end:

"(25) Curfew

If the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to provide just punishment for the offense, to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant, a condition of curfew is recommended. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order."

Section 5B1.4 is amended by inserting the following Commentary at the end:

Commentary

Application Note:

"1. Home detention, as defined by § 5F5.3, may only be used as a substitute for imprisonment. See § 5C2.1 (Imposition of a Term of Imprisonment). Under home detention, the defendant, with specified exceptions, is restricted to his place of residence during all nonworking hours. Curfew, which limits the defendant to his place of residence during evening and nighttime hours, is less restrictive than home detention and may be imposed as a condition of probation whether or not imprisonment could have been ordered."

Reason for Amendment: The purpose of this amendment is to set forth the conditions under which curfew is a recommended condition of probation and clarify that electronic monitoring may be used as a means of surveillance in connection with an order of curfew.

§ 5B1.3 Conditions of Probation

207. Amendment: Section 5B1.3(c) is amended by inserting immediately before the period at the end of the first sentence the following:

" , unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the other conditions set forth under 18 U.S.C. § 3563(b) ".

Reason for Amendment: The purpose of this amendment is to conform the guideline to a statutory revision.

208. Amendment: Section 5B1.3(a) is amended by inserting at the end "The court shall also impose a condition that the defendant not possess illegal controlled substances. 18 U.S.C. 3563(a)(3)."

Section 5B1.3 is amended by inserting the following as Commentary:

"Commentary

A broader form of the condition required under 18 U.S.C. 3563(a)(3) (pertaining to possession of controlled substances) is set forth as recommended condition (7) at § 5B1.4 (Recommended Conditions of Probation and Supervised Release)."

Reason for Amendment: This amendment references a mandatory condition of probation added by Section 7303 of the Anti-Drug Abuse Act of 1988.

§ 5C2.1 Imposition of a Term of Imprisonment

209. Amendment: Section 5C2.1(e) is amended by deleting "Thirty days" and inserting in lieu thereof "One day", by deleting "one month" wherever it appears and inserting in lieu thereof in each instance "one day", and by deleting "One month" and inserting in lieu thereof "One day".

Reason for Amendment: The purpose of this amendment is to enhance the internal consistency of the guidelines.

§ 5D3.3 Conditions of Supervised Release

210. Amendment: Section 5D3.3 is amended by deleting:

"(b) In order to fulfill any authorized purposes of sentencing, the court may impose other conditions reasonably related to (1) the nature and circumstances of the offense, and (2) the history and characteristics of the defendant. 18 U.S.C. 3583(d)."

and inserting in lieu thereof:

"(b) The court may impose other conditions of supervised release, to the extent that such conditions are reasonably related to (1) the nature and circumstances of the offense and the history and characteristics of the defendant, and (2) the need for the sentence imposed to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. 18 U.S.C. 3553(a)(2) and 3583(d)."

Reason for Amendment: The purposes of this amendment are to clarify the guideline and conform it to the statute as amended by Section 7108 of the Anti-Drug Abuse Act of 1988.

211. Amendment: Section 5D3.3(a) is amended by inserting at the end "The court shall also impose a condition that the defendant not possess illegal controlled substances. 18 U.S.C. 3563(a)(3)."

The Commentary to § 5D3.3 captioned "Background" is amended by inserting as the last sentence: "A broader form of the condition required under 18 U.S.C.

3563(a)(3) (pertaining to possession of controlled substances) is set forth as recommended condition (7) at § 5B1.4 (Recommended Conditions of Probation and Supervised Release)."

Reason for Amendment: This amendment references a mandatory condition of supervised release added by section 7303 of the Anti-Drug Abuse Act of 1988.

§ 5E4.1 Restitution

212. *Amendment:* Section 5E4.1 is amended by inserting the following as an additional subsection:

"(c) With the consent of the victim of the offense, the court may order a defendant to perform services for the benefit of the victim in lieu of monetary restitution or in conjunction therewith. 18 U.S.C. 3663(b)(4)."

Reason for Amendment: The purpose of this amendment is to insert language previously contained in § 5F5.3(b) where it had been erroneously placed.

213. *Amendment:* Section 5E4.1 is amended in the Commentary entitled "Background" by deleting:

"See S. Rep. No. 225, 98th Cong., 1st Sess. 95-96,"

and inserting in lieu thereof:

"See 18 U.S.C. 3563(b)(3) as amended by section 7110 of Pub. L. No. 100-690 (1988)."

Reason for Amendment: This amendment replaces a reference to legislative history with a citation to a revised statute. Section 7110 of the Anti-Drug Abuse Act of 1988 confirms the authority of a sentencing court to impose restitution as a condition of probation. Previously, such authority was inferred from 18 U.S.C. 3563(b)(20) (defendant may be ordered to "satisfy such other conditions as the court may impose") and from legislative history.

§ 5E4.2 Fines for Individual Defendants

214. *Amendment:* Section 5E4.2(a) is amended by deleting:

"If the guideline for the offense in Chapter Two prescribes a different rule for imposing fines, that rule takes precedence over this subsection."

Section 5E4.2(b) is amended by inserting at the end the following additional sentence:

"If, however, the guideline for the offense in Chapter Two provides a specific rule for imposing a fine, that rule takes precedence over subsection (c) of this section."

Reason for Amendment: The purpose of this amendment is to clarify the guideline. The last sentence of current § 5E4.2(a) is in the wrong place. This amendment moves the content of this sentence to subsection (b) where it belongs.

215. *Amendment:* Section 5E4.2(c)(3) is amended by deleting:

"1—\$25—\$250; 2—\$100—\$1,000; 4—\$250—\$2,500",

and inserting in lieu thereof:

"3 and below—\$100—\$5,000; 4—\$250—\$5,000".

Reason for Amendment: This amendment revises the fine table for offense levels 5 and below for the reasons set forth at the amendment to the Sentencing Table in Chapter Five, Part A.

§ 5E4.3 Special Assessments

216. *Amendment:* The Commentary to Section 5E4.3 captioned "Background" is amended in the first paragraph by inserting at the end:

"Under the Victims of Crime Act, as amended by Section 7085 of the Anti-Drug Abuse Act of 1988, the court is required to impose assessments in the following amounts with respect to offenses committed on or after November 18, 1988.

Individuals:

\$5, if the defendant is an individual convicted of an infraction or a Class C misdemeanor;
\$10, if the defendant is an individual convicted of a Class B misdemeanor;
\$25, if the defendant is an individual convicted of a Class A misdemeanor; and
\$50, if the defendant is an individual convicted of a felony.

Organizations:

\$50, if the defendant is an organization convicted of a Class B misdemeanor;
\$125, if the defendant is an organization convicted of a Class A misdemeanor; and
\$200, if the defendant is an organization convicted of a felony. 18 U.S.C. 3013,"

and in the second paragraph by deleting "The Act requires the court" and inserting in lieu thereof "With respect to offenses committed prior to November 18, 1988, the court is required".

Reason for Amendment: The purpose of this amendment is to conform the commentary to the statute as amended by Section 7085 of the Anti-Drug Abuse Act of 1988.

§ 5F5.3 Community Service

217. *Amendment:* Section 5F5.3(a) is amended by deleting "(a)", and by inserting "and sentenced to probation" immediately following "felony".

Section 5F5.3(b) is amended by deleting:

"(b) With the consent of the victim of the offense, the court may order a defendant to perform services for the benefit of the victim in lieu of monetary restitution. 18 U.S.C. 3663(b)(4)."

Reason for Amendment: The purposes of this amendment are to correct an erroneous statement in § 5F5.3(a) and to

delete § 5F5.3(b), which deals with restitution, and therefore should appear at § 5E4.1.

§ 5F5.4 Order of Notice to Victims

218. *Amendment:* The Commentary to § 5F5.4 captioned "Background" is amended by deleting:

"The legislative history indicates that, although the sanction was designed to provide actual notice to victims, a court might properly limit notice to only those victims who could be most readily identified, if to do otherwise would unduly prolong or complicate the sentencing process."

Reason for Amendment: The purpose of this amendment is to delete an unnecessary statement that could be subject to misinterpretation.

§ 5F5.5 Occupational Restrictions

219. *Amendment:* Section 5F5.5(a) is amended by deleting:

"(2) there is a risk that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted; and

(3) imposition of such a restriction is reasonably necessary to protect the public."

and inserting in lieu thereof:

"(2) imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted."

and by inserting "and" at the end of subsection (a)(1).

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

§ 5G1.1 Sentencing on a Single Count of Conviction

220. *Amendment:* Section 5G1.1 and the accompanying Commentary are amended by deleting:

"(a) If application of the guidelines results in a sentence above the maximum authorized by statute for the offense of conviction, the statutory maximum shall be the guideline sentence.

(b) If application of the guidelines results in a sentence below the minimum sentence required by statute, the statutory minimum shall be the guideline sentence.

(c) In any other case, the sentence imposed shall be the sentence as determined from application of the guidelines.

Commentary

If the statute requires imposition of a sentence other than that required by the guidelines, the statute shall control. The sentence imposed should be consistent with the statute but as close as possible to the guidelines."

and inserting in lieu thereof:

"(a) Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.

(b) Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.

(c) In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence—

- (1) is not greater than the statutorily authorized maximum sentence, and
- (2) is not less than any statutorily required minimum sentence.

Commentary

This section describes how the statutorily authorized maximum sentence, or a statutorily required minimum sentence, may affect the determination of a sentence under the guidelines. For example, if the applicable guideline range is 51–63 months and the maximum sentence authorized by statute for the offense of conviction is 48 months, the sentence required by the guidelines under subsection (a) is 48 months; a sentence of less than 48 months would be a guideline departure. If the applicable guideline range is 41–51 months and there is a statutorily required minimum sentence of 60 months, the sentence required by the guidelines under subsection (b) is 60 months; a sentence of more than 60 months would be a guideline departure. If the applicable guideline range is 51–63 months and the maximum sentence authorized by statute for the offense of conviction is 60 months, the guideline range is restricted to 51–60 months under subsection (c)."

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

§ 5G1.2 Sentencing on Multiple Counts of Conviction

221. *Amendment:* The Commentary to § 5G1.2 is amended in the second paragraph by deleting "any combination of concurrent and consecutive sentences that produces the total punishment may be imposed" and inserting in lieu thereof "consecutive sentences are to be imposed to the extent necessary to achieve the total punishment."

Reason for Amendment: The purpose of this amendment is to clarify the Commentary.

222. *Amendment:* The Commentary to § 5G1.2 is amended by inserting the following as an additional paragraph immediately following the first paragraph:

"This section applies to multiple counts of conviction (1) contained in the same indictment or information, or (2) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding."

Reason for Amendment: The purpose of this amendment is to clarify that this

guideline applies in the case of separate indictments that are consolidated for purposes of sentencing.

§ 5G1.3 Convictions on Counts Related to Unexpired Sentences

223. *Amendment:* Section 5G1.3, and the Commentary thereto, is deleted in its entirety as follows:

"§ 5G1.3 Convictions on Counts Related to Unexpired Sentences

If at the time of sentencing, the defendant is already serving one or more unexpired sentences, then the sentences for the instant offense(s) shall run consecutively to such unexpired sentences, unless one or more of the instant offenses(s) arose out of the same transactions or occurrences as the unexpired sentences. In the latter case, such instant sentences and the unexpired sentences shall run concurrently, except to the extent otherwise required by law.

Commentary

This section reflects the statutory presumption that sentences imposed at different times ordinarily run consecutively. See 18 U.S.C. 3584(a). This presumption does not apply when the new counts arise out of the same transaction or occurrence as a prior conviction.

Departure would be warranted when independent prosecutions produce anomalous results that circumvent or defeat the intent of the guidelines."

and the following inserted in lieu thereof:

"§ 5G1.3 Imposition of a Sentence on a Defendant Serving an Unexpired Term of Imprisonment

If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status), the sentence for the instant offense shall be imposed to run consecutively to the unexpired term of imprisonment.

Commentary

Under this guideline, the court shall impose a consecutive sentence where the instant offense (or any part thereof) was committed while the defendant was serving an unexpired term of imprisonment.

Where the defendant is serving an unexpired term of imprisonment, but did not commit the instant offense while serving that term of imprisonment, the sentence for the instant offense may be imposed to run consecutively or concurrently with the unexpired term of imprisonment. The court should impose a sentence for the instant offense that results in a combined sentence that approximates the total punishment that would have been imposed under § 5G1.2 (Sentencing on Multiple Counts of Conviction) had all of the offenses been federal offenses for which sentences were being imposed at the same time."

Reason for Amendment: This amendment specifies circumstances in which a consecutive sentence is

required by the guidelines. Erroneous language in the Commentary to this guideline concerning 18 U.S.C. 3584(a) is deleted.

§ 5K1.1 Substantial Assistance to Authorities (Policy Statement)

224. *Amendment:* Section 5K1.1 is amended by deleting "made a good faith effort to provide" and inserting in lieu thereof "provided".

Section 5K1.1(a) is amended in the first sentence by deleting "conduct".

Reason for Amendment: The purpose of this amendment is to clarify the Commission's intent that departures under this policy statement be based upon the provision of substantial assistance. The existing policy statement could be interpreted as requiring only a willingness to provide such assistance. The amendment also makes an editorial correction.

§ 5K1.2 Refusal to Assist (Policy Statement)

225. *Amendment:* The Commentary to § 5K1.2 is deleted in its entirety as follows:

"Commentary

Background: The Commission considered and rejected the use of a defendant's refusal to assist authorities as an aggravating sentencing factor. Refusal to assist authorities based upon continued involvement in criminal activities and association with accomplices may be considered, however, in evaluating a defendant's sincerity in claiming acceptance of responsibility."

Reason for Amendment: The purpose of this amendment is to delete unnecessary Commentary containing an unclear example.

Chapter Five, Part K, Subpart 2 (General Provisions)

226. *Amendment:* Chapter Five, Part K is amended by adding at the end:

"§ 5K2.15 Terrorism (Policy Statement)

If the defendant committed the offense in furtherance of a terroristic action, the court may increase the sentence above the authorized guideline range."

Reason for Amendment: This amendment adds a specific policy statement concerning consideration of an upward departure when the offense is committed for a terroristic purpose. This amendment does not make a substantive change. Such conduct is currently included in the broader policy statement at § 2K2.9 (Criminal Purpose) and other policy statements. See *United States v. Yu Kikumura*, Crim. No. 88–16 (D. N.J. Feb. 9, 1989) (1989 U.S. Dist. LEXIS 1516).

§ 6A1.1 Presentence Report

227. *Amendment:* Section 6A1.1 is amended in the title by inserting at the end "(Policy Statement)".

Reason for Amendment: The purpose of this amendment is to designate § 6A1.1 as a policy statement. Designation of this section as a policy statement is more consistent with the nature of the subject matter.

§ 6A1.3 Resolution of Disputed Factors

228. *Amendment:* Section 6A1.3 is amended in the title by inserting at the end "(Policy Statement)".

Reason for Amendment: The purpose of this amendment is to designate § 6A1.3 as a policy statement. Designation of this section as a policy statement is more consistent with the nature of the subject matter.

§ 6B1.2 Standards for Acceptance of Plea Agreements (Policy Statement)

229. *Amendment:* The Commentary to § 6B1.2 is amended in the second paragraph by deleting "and does not undermine the basic purposes of sentencing," and inserting in lieu thereof "(i.e., that such departure is authorized by 18 U.S.C. 3553(b)). See generally Chapter 1, Part A (4)(b)(Departures)".

Reason for Amendment: The purpose of this amendment is to clarify the Commentary.

Appendix A (Statutory Index)

230. *Amendment:* Appendix A (Statutory Index) is amended in the second sentence of the "Introduction" by deleting "conduct" and inserting in lieu thereof "nature of the offense conduct charged in the count", and by deleting "select" and inserting in lieu thereof "use"; and in the third sentence of the "Introduction" by deleting "the court is to apply" and inserting in lieu thereof "use", by deleting "which is", and by deleting "conduct for" and inserting in lieu thereof "nature of the offense conduct charged in the count of".

Reason for Amendment: The purpose of this amendment is to clarify the operation of the Statutory Index in relation to §§ 1B1.1 and 1B1.2(a).

231. *Amendment:* Appendix A is amended by inserting as an additional paragraph at the end of the Introduction:

"The guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction. (See § 1B1.9)."

Appendix A is amended by deleting:

"7 U.S.C. 52, 2N2.1", "7 U.S.C. 60, 2N2.1", "10 U.S.C. 847, 2J1.1, 2J1.5", "16 U.S.C. 198c, 2B1.1, 2B1.3, 2B2.3", "16 U.S.C. 204c, 2B1.1, 2B1.3", "16 U.S.C. 604, 2B1.3", "16 U.S.C. 606, 2B1.1,

2B1.3", "16 U.S.C. 668dd, 2Q2.1", "16 U.S.C. 670j(a)(1), 2B2.3", "16 U.S.C. 676, 2B2.3", "16 U.S.C. 682, 2B2.3", "16 U.S.C. 683, 2B2.3", "16 U.S.C. 685, 2B2.3", "16 U.S.C. 689b, 2B2.3", "16 U.S.C. 692a, 2B2.3", "16 U.S.C. 694a, 2B2.3", "18 U.S.C. 113(d), 2A2.3", "18 U.S.C. 113(e), 2A2.3", "18 U.S.C. 290, 2F1.1", "18 U.S.C. 402, 2J1.1", "18 U.S.C. 437, 2C1.3", "18 U.S.C. 1164, 2B1.3", "18 U.S.C. 1165, 2B2.3", "18 U.S.C. 1382, 2B2.3", "18 U.S.C. 1504, 2J1.2", "18 U.S.C. 1726, 2F1.1", "18 U.S.C. 1752, 2B2.3", "18 U.S.C. 1793, 2P1.4", "18 U.S.C. 1856, 2B1.3", "18 U.S.C. 1863, 2B2.3", "40 U.S.C. 193e, 2B1.1, 2B1.3", "42 U.S.C. 1995, 2J1.1", "42 U.S.C. 2000h, 2J1.1", "42 U.S.C. 4912, 2Q1.3".

Reason for Amendment: The purposes of this amendment are to clarify that the guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction, and to delete references to statutes that apply solely to such offenses.

232. *Amendment:* Appendix A is amended by deleting:

"18 U.S.C. 1512, 2J1.2",

and inserting in lieu thereof:

"18 U.S.C. 1512(a), 2A1.1, 2A1.2, 2A2.1, 18 U.S.C. 1512(b), 2A2.2, 2J1.2, 18 U.S.C. 1512(c), 2J1.2",

and by deleting:

"21 U.S.C. 848, 2D1.5",

and inserting in lieu thereof:

"21 U.S.C. 848(a), 2D1.5, 21 U.S.C. 848(b), 2D1.5, 21 U.S.C. 848(e), 2A1.1".

Appendix A is amended by inserting the following statutes in the appropriate place according to statutory title and section number:

"18 U.S.C. 247, 2H1.3", "18 U.S.C. 709, 2F1.1", "18 U.S.C. 930, 2K2.5", "18 U.S.C. 1460, 2G3.1", "18 U.S.C. 1466, 2G3.1", "18 U.S.C. 1516, 2J1.2", "18 U.S.C. 1716C, 2B5.2", "18 U.S.C. 1958, 2A2.1, 2E1.4", "18 U.S.C. 1959, 2E1.3", "42 U.S.C. 7270b, 2B2.3", "43 U.S.C. 1773(a), (43 CFR 4140.1(b)(1)(i)), 2B2.3", "49 U.S.C. 1472(c), 2A5.2".

Appendix A is amended on the line beginning "18 U.S.C. 371" by inserting "2A2.1, 2D1.4," immediately before "2T1.9".

Appendix A is amended in the line beginning "18 U.S.C. 1005" by inserting ", § 2S1.3" immediately following "2F1.1".

Appendix A is amended in the line beginning "18 U.S.C. 1028" by inserting "2L1.2, 2L2.1, 2L2.3 immediately following "2F1.1".

Appendix A is amended in the line beginning "26 U.S.C. 7203" by inserting "2S1.3," immediately before "2T1.2".

Reason for Amendment: The purpose of this amendment is to make the statutory index more comprehensive.

233. *Amendment:* Appendix A is amended in the line beginning "18 U.S.C. 113(a)" by deleting ", 2A3.1".

Appendix A is amended in the line beginning "18 U.S.C. 1854" by deleting ", 2B2.3".

Appendix A is amended in the line beginning "42 U.S.C. 2278(a)(c)" by deleting "42 U.S.C. 2278(a)(c)" and inserting in lieu thereof "42 U.S.C. 2278a(c)".

Reason for Amendment: The purposes of this amendment are to delete incorrect references and to insert a correct reference.

234. *Amendment:* Appendix A is amended by inserting the following statutes in the appropriate place according to statutory title and section number:

"18 U.S.C. 2251A.....2G2.3",
"21 U.S.C. 858.....2D1.10".

Appendix A is amended on the line beginning "18 U.S.C. 1464" by deleting "\$ 2G3.1" and inserting in lieu thereof "\$ 2G3.2" and by inserting the following statute in the appropriate place according to statutory title and section number:

"18 U.S.C. 1468.....2G3.2".

Appendix A is amended on the line beginning "21 U.S.C. 845" by deleting "2D1.3" and inserting in lieu thereof "2D1.2", and on the line beginning "21 U.S.C. 845a" by deleting "2D1.3" and inserting in lieu thereof "2D1.2".

Appendix A is amended in the line beginning "47 U.S.C. 223" by deleting "47 U.S.C. 223" and inserting in lieu thereof "47 U.S.C. 223(b)(1)(A)".

Reason for Amendment: The purpose of this amendment is to reflect the creation of new offense guidelines.

235. *Amendment:* Appendix A is amended on the line beginning "18 U.S.C. 844(h)" by deleting ", 2K1.6" and inserting in lieu thereof "(offenses committed prior to November 18, 1988), 2K1.6, 2K1.7".

Reason for Amendment: The purpose of this amendment is to reflect a revision in the offense covered by 18 U.S.C. 844(h).

Correction of Chapter Five Subpart Numbers

236. *Amendment:* Sections 5C2.1, 5D3.1, 5D3.2, 5D3.3, 5E4.1, 5E4.2, 5E4.3, 5E4.4, 5F5.1, 5F5.2, 5F5.3, 5F5.4, and 5F5.5 are amended by deleting the number designating the subpart (i.e., the digit immediately following the letter in the section designation) wherever it appears and inserting in lieu thereof "1" in each instance.

The Commentary to § 2D1.1 captioned "Background" is amended by deleting "\$§ 5D3.1-5D3.3" and inserting in lieu thereof "\$§ 5D1.1-5D1.3".

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

Miscellaneous Conforming Revisions

237. *Amendment:* The Commentary to § 1B1.2 captioned "Application Notes" is amended in Note 3 by deleting "at Sentencing)" and inserting in lieu thereof "in Imposing Sentence)".

The Commentary to § 1B1.3 captioned "Application Notes" is amended in Note 4 by deleting "(Assault)" and inserting in lieu thereof "(Aggravated Assault)".

The Commentary to § 1B1.3 captioned "Application Notes" is amended in Note 5 by deleting "§ 2K2.3" and inserting in lieu thereof "§ 2K2.2", by deleting "12" and inserting in lieu thereof "16", and by deleting "abusive contact was accomplished as defined in 18 U.S.C. 2242, increase by 4 levels" and inserting in lieu thereof "offense was committed by the means set forth in 18 U.S.C. 2242".

The Commentary to § 1B1.4 captioned "Background" is amended by deleting "3557" and inserting in lieu thereof "3577".

The Commentary to § 2A5.2 captioned "Background" is amended by inserting "or Aboard" immediately following "Materials While Boarding".

The Introductory Commentary to Chapter 2, Part B is amended by deleting "Order and".

The Commentary to § 2B1.1 captioned "Application Notes" is amended in Note 2 by deleting "(Attempt, Solicitation, or Conspiracy Not Covered by a Specific Guideline)" and inserting in lieu thereof "(Attempt, Solicitation, or Conspiracy)".

The Commentary to § 2R1.1 captioned "Application Notes" is amended in Note 7 by inserting "Category" immediately following "Criminal History".

The Commentary to § 2T1.4 captioned "Application Notes" is amended in Note 3 by inserting "Use of" immediately before "Special Skill".

The Commentary to § 3B1.4 is amended by deleting "(Role in the Offense)" the first time it appears and inserting in lieu thereof "(Aggravating Role)", and by deleting "(Role in the Offense)" the second time it appears and inserting in lieu thereof "(Mitigating Role)".

The Commentary to § 3D1.2 captioned "Application Notes" is amended in Note 1 by deleting "25 (18+1+6) rather than 28" and inserting in lieu thereof "28 (18+4+6) rather than 31".

The Commentary to § 3D1.3 captioned "Application Notes" is amended in the last sentence of Note 4 by deleting "Loss or Damage" and inserting in lieu thereof "Damage or Loss".

The Commentary following § 3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in example 1 by deleting "19" and

inserting in lieu thereof "22", by deleting "1-Level" and inserting in lieu thereof "4-Level", by deleting "25." and inserting in lieu thereof "28.", by deleting "(25)" and inserting in lieu thereof "(28)", and by deleting "28" and inserting in lieu thereof "31".

The Commentary following § 3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in the last 2 sentences of example 3 by deleting "10" wherever it appears and inserting in lieu thereof in each instance "8".

The Commentary following § 3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in example 5 by deleting "13" wherever it appears and inserting in lieu thereof "14".

The Commentary following § 3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended by deleting Illustration 2 and renumbering Illustrations 3, 4, and 5 as 2, 3, and 4, respectively.

Reason for Amendment: The purpose of this amendment is to conform cross-references and illustrations of the operation of the guidelines to the guidelines, as amended.

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